Petition

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NO. 81-313

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980

JOSEPH OLIVER, WARDEN
HOLMAN PRISON, ALABAMA

Petitioner

V.

JOHNNY HARRIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1.(A) Were the State court findings on credibility clearly implied by its order and opinion?

(B) May a District Court in an action under 28 U.S.C. 2254[1] by a State prisoner make credibility findings on the basis of the transcript of a State hearing which complied with 28 U.S.C. 2254(d), rather than holding an independent hearing?

2. Where the state courts conduct a full and fair hearing on a Federal constitutional claim by a state prisoner but decide the ultimate Federal issue on a wrong standard, is the Federal District Court in an action under 28 U.S.C. 2254 authorized to return the claim to state

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[1]See Appendix "C"

court for determination under the correct standard in the alternative to holding a duplicate hearing in Federal Court?

3. Where a party enters a plea of guilty, is advised and examined by the Court in accordance with Boykin v. Alabama (395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 [1969]) and advises the Court that understands his rights and the consequences of his plea, that he is under no duress and is pleading guilty because he is guilty, does such a party waive his right to later claim that he is really an innocent man who was forced to plead guilty by matters he withheld from the Court or about which he misled the Court?

PARTIES

In the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Fifth Circuit the parties were Johnny Harris, Respondent herein, and Joseph Oliver, Warden of Holman Prison, Alabama, Petitioner herein. The real party in interest was and is the State of Alabama.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

PARTIES..... iii

TABLE OF CASES..... vi

TABLE OF CONSTITUTIONAL PROVISIONS..... viii

TABLE OF STATUTES..... ix

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATUTORY PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 3

STATEMENT OF THE FACTS..... 11

I. THE CONFLICTING EVIDENCE..... 11

A. HARRIS' TESTIMONY..... 12

B. THE ATTORNEYS' TESTIMONY..... 13

II. THE UNCONFLICTING EVIDENCE..... 16

SUMMARY OF THE ARGUMENT..... 17

REASONS FOR GRANTING
THE WRIT..... 20

I. THE DISTRICT COURT
WAS NOT REQUIRED TO HOLD
A HEARING (CONFLICTS WITH
CONTROLLING OPINIONS)..... 20

A. IMPLIED STATE
COURT FINDINGS ON
CREDIBILITY..... 22

B. THE DISTRICT
COURT WAS ABLE TO
DETERMINE CREDIBILITY
FROM THE RECORD..... 25

II. THE DISTRICT COURT
SHOULD BE PERMITTED TO
REQUEST AN ARTICULATION
OF CREDIBILITY FINDINGS
OR A FINDING UNDER THE
CORRECT STANDARD BY THE
STATE COURT RATHER THAN
CONDUCTING AN ENTIRELY
NEW HEARING (A NOVEL
QUESTION)..... 28

III. DID HARRIS' "MISLEADING"
THE COURT AS TO THE REASONS
FOR HIS PLEA CONSTITUTE A
WAIVER OF HIS PRESENT CLAIM
(A NOVEL QUESTION)..... 30

CONCLUSION..... 36

CERTIFICATE OF SERVICE..... 38

TABLE OF CASES

PAGE

Barker v. Wingo,
407 U.S. 514, 33 L. Ed.
2d 101, 92 S. Ct. 2182
(1972)..... 34

Boykin v. Alabama,
395 U.S. 238, 23 L. Ed.
2d 274, 89 S. Ct. 1709
(1969)..... ii,19,32

Brady v. United States,
397 U.S. 742, 25 L. Ed.
2d 747, 90 S. Ct. 1463
(1970)..... 32

Brewer v. Williams,
430 U.S. 387, 51 L. Ed.
2d 424, 97 S. Ct. 232
(1977)..... 23

California v. Green,
399 U.S. 149, 26 L. Ed.
2d 489, 90 S. Ct. 1930
(1970)..... 26

Cuyler v. Sullivan,
446 U.S. 335, 64 L. Ed.
2d 333, 100 S. Ct. 1708
(1980)..... 23

Furman v. Georgia,
408 U.S. 238, 33 L. Ed.
2d 346, 92 S. Ct. 2726
(1972)..... 4

PAGE

Harris v. Oliver,
(5th Cir., 1981) 645 F.
2d 327..... 1

Harris v. State,
(S. Ct. Ala., 1977) 352
So. 2d 479..... 6

Harris v. State,
(Cr. App. Ala., 1976)
352 So. 2d 460..... 6

Harris v. State,
(S. Ct. Ala., 1978) 367
So. 2d 534..... 8

Harris v. State,
(Cr. App. Ala., 1978)
367 So. 2d 524..... 8

Hubbard v. Alabama,
408 U.S. 936, 33 L. Ed.
2d 752, 92 S. Ct. 2859
(1972)..... 4

LaVallee v. Delle Rose,
410 U.S. 690, 35 L. 3d
2d 637, 93 S. Ct. 1203
(1973)..... 22,23

McMann v. Richardson,
397 U.S. 759, 25 L. Ed.
2d 736, 90 S. Ct. 1441
(1970)..... 32

Neil v. Biggers,
409 U.S. 188, 34 L. Ed.
2d 401, 93 S. Ct. 375
(1972)..... 22

PAGE

Ohio v. Roberts,
___ U.S. ___, 65 L. Ed.
2d 597, 100 S. Ct. ___
(1980)..... 27

Parker v. North Carolina,
397 U.S. 790, 25 L. Ed.
2d 785, 90 S. Ct. 1458
(1970)..... 32

Sumner v. Mata,
___ U.S. ___, 66 L. Ed.
2d 722, 101 S. Ct. ___
(1981)..... 18,22,
27

Townsend v. Sain,
372 U.S. 293, 9 L. Ed.
2d 770, 83 S. Ct. 745
(1963)..... 22,23

Tollett v. Henderson,
411 U.S. 258, 36 L. Ed.
2d 235, 93 S. Ct. 1602
(1973)..... 32

TABLE OF CONSTITUTIONAL PROVISIONS

PAGE

U.S. Constitution,
Amendment Six..... 2

U.S. Constitution,
Amendment Fourteen..... 2

TABLE OF STATUTES

PAGE

United States Code,

Title 28,
Section 1224..... 1

Section 2254..... i,3, 17,22

Code of Alabama, 1940

Title 14,
Section 319..... 5

Section 395..... 3

Section 415..... 3

OPINIONS BELOW

The judgment and opinion of the District Court is not reported but is submitted as Appendix "A" hereto.

The judgment and opinion of the Court of Appeals is reportes as:

Harris v. Oliver (5th Cir., 1981) 645 F. 2d 327 The same is submitted as appendix "B" hereto.

JURISDICTION

The order of the United States Court of Appeals vacating the District Court's order was issued on May 18, 1981. Rehearing was denied on June 23, 1981, and this petition is filed within ninety days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United States

Code, Section 1224 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States, in particular that portion which reads:

> "In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States, in particular that portion which reads:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Title 28 United States Code, Section 2254, the same being voluminous is submitted as Appendix "C" hereto.

STATEMENT OF THE CASE

On April 6, 1971, Respondent Harris, attended by two court-appointed attorneys, came before the Circuit Court of Jefferson County, Alabama, charged with four robberies and one rape. At that time both robbery and rape were capital offenses in Alabama.[2] On that date, April 6, 1971, Harris was advised of his constitutional rights and the consequences of a plea of guilty both orally and in writing and acknowledged understanding these. Harris was urged to address any questions he had to the trial judge, but he did not do so. Harris

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[2]See Title 14, Sections 395 and 415, Code of Alabama, 1940.

advised the trial judge that he was under no duress, that he was guilty and desired to plead guilty. At no point did Harris ever advise the Court of any disagreement between himself and his attorneys. The State trial judge examined Harris and his attorneys and found that the pleas were voluntary and were entered intelligently. The trial court accepted the guilty pleas and sentenced Harris to life imprisonment. (R. pp. 77-86 and Respondent's Exhibit "A," pp. 270-286, 612-617, 726-728, 778-780, 824-826 869-871 and 914-196)

Harris made no effort to attack his guilty pleas or the convictions or sentences based on them until after the decision of this Honorable Court invalidating Alabama's Death Penalty Statutes.[3] In 1973 Harris filed a Petition for a

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[3]See Furman v. Georgia 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) and Hubbard v. Alabama 408 U.S. 238, 22 L. Ed. 2d 346, 92 S. Ct. 2726 (1972).

Writ of Error Coram Nobis attacking his convictions. In this petition Harris did not raise the claim he presently advances; in fact, the only claim he made concerning his attorneys was that:

> ". . .'Petitioner contends that he was represented in court, by a court appointed attorney, who seemingly didn't have petitioner's best interest at heart'. . . ." (R. p. 108)

This petition was denied by the Circuit Court of Jefferson County, Alabama. (R. p. 104 and 108)

Subsequently the petitioner engaged in a prison riot. The rioters as part of a pre-arranged plan attempted to kill certain inmates and guards. Of these, one guard died with the result, that Harris became liable for the only capital offense then existing in Alabama: first degree murder by a life convict under Title 14, Section 319, Code of Alabama, 1940. Harris was indicted for this

offense and subsequently convicted and sentenced to death. See Harris v. State (Cr. App. Ala. 1976) 352 So. 2d 460; Aff. Harris v. State (S. Ct. Ala., 1977) 352 So. 2d 479.[4]

It was after this conviction and sentence that Harris began to raise the claim at issue in the instant case. That claim is that his guilty pleas were involuntary because of the ineffective representation which he received from various attorneys at every stage of the proceedings against him. After unsuccessful attempts to raise the claim by Federal habeas corpus without exhausting his State remedies, Harris brought a coram nobis action in State Court. (R. pp. 2-114)

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[4]This conviction and sentence have been set aside on unrelated grounds.

A full hearing requiring five (5) court days and producing a six volume transcript and record was held in State Court. The dispositive issue was whether to believe Harris or his former attorneys. The State trial judge accepted as true the testimony of the Attorneys and denied the writ. (Respondent's Exhibit "A")

Appeal was taken to the Court of Criminal Appeals of Alabama. The Court of Appeals recognized that the essential factual issue to be credibility and held that this issue was resolved by the trial court.[5] After discussing the case

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[5]"...Clearly, the conflict in the testimony presented a question of fact. It is not within the province of this Court to pass judgment on the truth or falsity of conflicting evidence...." (367 So. 2d 524, 527)

"...As hereinabove noted, it is not within the province of this Court to resolve such conflicts in the evidence... The trial court's findings are supported by the evidence...."(367 So. 2d 524, 528)

thoroughly the Court of Appeals affirmed the trial court. Harris v. State (Cr. App. Ala., 1978) 367 So. 2d 524; cert. den. 367 So. 2d 534 (Appendix "D")

Harris then resurrected his previous Federal habeas corpus action. It was agreed all around that the State courts had used a standard for judging the effective assistance counsel that was different from that which prevails in the Fifth Circuit, and the District Court so found.[6] For this reason, the District Court did not accept the State Court determination of the ultimate issue of the effective assistance. However, the

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[6]"...The Circuit Court of Jefferson County applied the 'farce and mockery' test in accordance with Williams v. Beto, 354 F. 2d 698 (5th Cir. 1965). The farce and mockery test is no longer valid in the Fifth Circuit...." Appendix "A", p. 20

District Court did not hold an independent hearing but relied on the transcript and record of the State Court proceedings as well as certain affidavits filed in the earlier Federal Court proceedings. The District Court either accepted the State Court findings on credibility or made identical findings based on the transcript. The District Court accepted as true the testimony of the lawyers in the State court proceeding rather than that of Harris and denied the writ. (Appendix "A")

Appeal was taken to the United State's Court of Appeals for the Fifth Circuit. While recognizing that the ultimate factual issue in the case was credibility,[7] the Court of Appeals held

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[7]"...We reject petitioner's [i.e. Harris'] contentions that the record compels a finding that he was denied the effective assistance of counsel and that his pleas of guilty were not informed and voluntary. If credited the evidence detailed in the magistrate's opinion will support a contrary holding...." (Appendix "B", p. 54) (Emphasis supplied)

that, since the State Courts had applied the wrong standard in deciding the ultimate issue of the effective assistance of counsel, the District Court could not rely on any portion of the State Court proceedings. In other words, it was not enough for the District Court to reject the State Court determination which was based on the wrong standard, but an entirely new hearing had to be held in Federal Court. (Appendix "B")

Rehearing en banc was applied for, pointing out that the decision and opinion of the Court of Appeals conflicted with every decision of this Honorable Court both on the acceptance by the District Court of State Court factual findings and on the acceptance by the District Court of State Court findings on ultimate Federal Questions whether based on correct standards or not. The rehearing application also pointed out that the

panel decision was in conflict with a prior panel decision wherein the Court of Appeals had done exactly what the District Court did in the instant case, and the application raised the other issues raised herein. This application was overruled on June 23, 1981. (Appendix B)

STATEMENT OF THE FACTS

I

THE CONFLICTING EVIDENCE

The State Court hearing (Respondent's Exhibit "A") reflected sharp conflicts in the evidence on all but one point. The record shows that from the time of his pre-indictment line-up until his guilty plea Harris was represented by seven different attorneys. According to Harris each of these attorneys were grossly ineffective both by misfeasance and malfeasance. On the other hand, the

testimony of these attorneys as well as other evidence tended to show representation that was intelligent, diligent and skillful. There is no point in burdening this Honorable Court with a recitation of the conflicting evidence of what happened at the line-up, preliminary hearings, and before trial. These are discussed somewhat in the opinion of the Court of Criminal Appeals (Appendix "D"), but the crucial question on Harris' claim was what occurred at the time of the guilty plea.

A.

HARRIS' TESTIMONY

Harris testified that on the day of his trial for rape, April 6, 1971, his attorneys informed him that they had subpoenaed no witnesses, were not prepared to try the case, did not intend to fight in his behalf or "buck the system" and

that, since he could get the death penalty in any of the five cases, they advised him to plead guilty. In order to avoid the death penalty, Harris claimed that he took his attorneys' advice. (Respondent's Exhibit "A," pp. 678-689)

B.

THE ATTORNEYS' TESTIMONY

Attorneys Louis Scholl and Milton Garrett were appointed to represent Harris in his various cases, but, with the approval of Harris, worked together on all of the cases. (Respondent's Exhibit "A", page 228)

Both of these attorneys had high qualifications and considerable experience. Half of the individual practices of each consisted of criminal cases. (Respondent's Exhibit "A", pp.257, 462, 494-495, 511, 696, 704, 708 and 713-714)

The trial preparation of these attorneys is shown to be thorough and diligent by the record but was, of course, mooted by Harris' guilty pleas. According to these attorneys, they appeared on the day of trial ready, willing, able and expecting to defend Harris on the rape charge. For strategic reasons[8] the alibi witnesses had not been subpoenaed but were in court or on call. (Respondents Exhibit "A," pp. 268-266 & 609)

The venire was being identified when Harris leaned over to Attorney Scholl. Mr. Scholl described the event this way:

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[8]The strategic reasons were: In pretrial interviews with these witnesses, serious discrepancies appeared in their testimony. The attorneys were concerned that if these witnesses were subpoenaed, the State would learn of them and might discover the discrepancies. The witnesses each agreed to appear without subpoena.

"...[H]e [Harris] was seated in approximately the very same position he is right now. Mr. Garrett and I were on each side of him. I believe I was sitting where Ms. Hicks is and he leaned forward to me and whispered, do you think you can get those five life sentences.

"Q. What was your reply to that?

"A. I said, I don't know, that they had made this offer months before and we had in rejecting it, the District Attorney--there was never any more plea bargaining from that point. When we were going to try all five cases the, of course, it was never brought up again. It was just assumed by all parties in my best judgment that we were going to try each one. When the defendant said he was going to stonewall all five cases and make them try all five, we said, all right, we were going to do that and suddenly we are in the process of this courtroom striking a jury and he turns to me and whispers. I don't want to go through five trials; they have got me cold on three cases. I said, well, I will simply ask the D.A. My recollection was that I had asked for a few minutes and Mr. McDonald and Mr. Purvis and myself--I don't recall where Milton was. He may have been involved in the conversation. I asked them if

> they still were going to offer the five cases. They said, what does your client want, to change his plea and I said apparently he does. And they said, yes, we will give you five life sentences." (Respondent's Exhibit "A", pp. 267-268) (Emphasis supplied)

The attorneys did not advise Harris to plead guilty on the day of trial; on the contrary, Mr. Scholl testified:

> "It was his decision to enter these pleas. I thought that it was a rather dumb move and so told him." (Respondent's Exhibit "A", p. 290)

II.

THE UNCONFLICTING EVIDENCE

It was proven without conflict that Harris was advised of his Constitutional rights and the consequences of his plea. Harris, himself, admitted being examined by the trial judge at the time of his plea, but he claimed loss of memory as to what was said to him or what he said. Harris claimed that at one point he

attempted to tell the Judge why he was pleading guilty, but one of his lawyers "cut him off". He admitted making no other effort to inform the judge of this matter. (Respondent's Exhibit "A," pp. 270, 272-277, 286, 290, 612-615, 668, 678-679 and 690-694)

SUMMARY OF THE ARGUMENT

I. A. If the District Court accepted anything of the state court hearing, other than the raw material contained in the transcript, it was the State court findings on credibility. Credibility findings are "factual issues" within the meaning of 28 U.S.C. 2254(d). The State trial court's finding on credibility in favor of the lawyers, although unarticulated, was clearly implied and recognized by the State appellate courts. Therefore, the Court of Appeals erred in hold-

ing that the State Court findings could not be reconstrued.

B. The District Court did not expressly adopt the State Court findings on credibility, but apparently made its own findings based on the transcript of the State Court hearing. The Court of Appeals held that the District Court could not do this since it did not observe the witnesses. Yet, the demeanor of witnesses is only one criterion for judging the credibility of witnesses. Harris' claim was incredible on its face and its credibility is further weakened by failure to assert it until he could take full benefit from the guilty plea while avoiding its adverse effects. This Honorable Court has recognized that perfectly valid findings of fact can be made from transcripts by courts which did not observe the witnesses. Sumner v. Mata, ___ U.S. ___, 66 L. Ed. 2d 722, 101 S. Ct. ___

(1981). There is absolutely no reason why the District Court could not do the same thing.

II. Since the only faults found in the State Court procedures were the failure to articulate credibility findings and the use of the wrong standard in deciding the ultimate federal question, it would be a waste of judicial resources to require the District Court to duplicate the State Court hearing. It would make more sense to allow the District Court to request that the State Court articulate its credibility findings and/or reconsider its determination of the ultimate Federal Question according to the correct standard.

III. This Honorable Court has never considered a case where the trial court in compliance with Boykin v. Alabama (395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 [1969]) advised and examined an

accused prior to his plea of guilty and where the party later raised a claim based on facts which he withheld from the Court or misled the Court about at the time of the plea. This case presents that situation, and the writ ought to issue to consider it.

REASONS FOR GRANTING THE WRIT

I

THE DISTRICT COURT WAS NOT REQUIRED TO HOLD A HEARING

(CONFLICT WITH CONTROLLING OPINIONS)

This case presents a pure question of credibility: Should Harris or his former lawyers be believed. If Harris is to be believed, then he received, by any standards, the most grossly ineffective assistance of counsel imaginable from the time of his arrest up to and through his guilty pleas. If, on the other hand, the lawyers are to be believed, then by any standards Harris received the assistance of counsel that was not only reasonably

effective but was intelligent, skillful and diligent. If Harris is believed, his guilty plea was coerced by his lawyer's statements just before trial that they were not prepared and did not intend to defend him. If the lawyers are to be believed they were prepared, and the guilty plea was entirely Harris' idea and was entered contrary to their advice. The District Court either accepted the State Court finding on credibility or made its own finding on the basis of the transcript of the State court hearing. The Court of Appeals ruled that the cause had to be remanded to the District Court because (1) the State court credibility findings could not be reconstructed and (2) the District Court could not make credibility findings without observing the witnesses. In so ruling, the District Court ruled contrary to two lines of authority by this Honorable Court.

A.

IMPLIED STATE COURT FINDINGS ON CREDIBILITY

It is well established that findings of fact by State courts after hearings meeting the standards of 28 U.S.C. 2254 (d) are due a strong presumption of correctness. Townsend v. Sain, 372 U.S. 293, 309, 9 L. Ed. 2d 770, 783, 83 S. Ct. 745 (1963); LaVallee v. Delle Rose, 410 U.S. 690, 35 L. Ed. 2d 637, 93 S. Ct. 1203 (1973); Sumner v. Mata, ___ U.S. ___, 66 L. Ed. 2d 722, 101 S. Ct. ___ (1981) A "finding of fact" does not include the determination of the ultimate Federal Question.[9] Townsend v. Sain, supra; Neil v. Biggers, 409 U.S. 188, 193 N. 3, 34 L. Ed. 2d 401, 477, 93 S. Ct. 375, (1972); Brewer v. Williams, 430 U.S.

[9]Thus, even if the State courts in the instant case had used the correct standard in deciding the ultimate Federal Question, the District Court would have had to make an independent determination.

387, 403-404, 51 L. Ed. 2d 424, 439, 97 S. Ct. 1232 (1977); Cuyler v. Sullivan, 446 U.S. 335, 342, 64 L. Ed. 2d 333, 342, 100 S. Ct. 1708 (1980) However, "finding of fact" does include credibility. Townsend v. Sain, supra; LaVallee v. Delle Rose, supra.

Triers of fact seldom specifically articulate their credibility findings. If a judge issues an opinion stating that he does not believe a certain witness, it is an insult to the disbelieved witness. For this reason, this Honorable Court has consistantly recognized that implied findings are to be given the same weight as expressed findings. Townsend v.Sain, 372 U.S. 293, 314, 9 L. Ed. 2d 770, 789, 83 S. Ct. 745 (1963) What this Honorable Court wrote in La Vallee v. Delle Rose, (supra) applies equally here:

> "...Although it is true that the state trial court did not specifically articulate its credibility findings, it can

> scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him...." (410 U.S. 690, 692; 35 L. Ed. 2d 637, 640)

The State trial court's opinion in this case clearly shows that the Court believed the lawyers rather than Harris. (Respondent's Exhibit "A", pp. 945-956) The State trial judge wrote in particular the following:

> "...Both of these attorneys have handled numerous criminal matters competently and effectively in this Court and the five cases in question here are no exception...." (Respondent's Exhibit "A," p. 954)

Thus, the State Court articulated the finding that these lawyers handle many cases competently and handled Harris' case the same way. Can it be believed that the State court meant that the lawyers regularly show up for trial unprepared and force their clients to plead guilty? This would be incompetent by any standard. It is obvious that the State

trial judge believed the lawyers rather than Harris. The State Appellate Court recognized this at several points in its opinion. (Appendix "D," pages 80,86, and 90) In holding that the District Court could not follow the State Court finding of fact, the Court of Appelas ruled contrary to the decisions of this Honorable Court.

B.

THE DISTRICT COURT WAS ABLE TO DETERMINE CREDIBILITY FROM THE RECORD

The District Court did not specifically adopt the State Court findings on credibility. The Court did review the entire transcript of the State Court hearing and no doubt made independent findings on the basis of such review. The Court of Appeals held that the District Court could not do this but had to observe the witnesses.

The observable demeanor of a witness is only one of many criterion for judging credibility. Other criterion include: The witness' character, his interest of lack thereof in the outcome of the proceedings, the consistancy of his claim with other evidence and common experience. All of these criterion were apparent from the hearing transcript, and all pointed toward Harris' former lawyers as the truthful witnesses.

The Court of Appeals held that the District Court could not determine credibility without observing the witnesses. Yet, depositions and transcripts of testimony at former proceedings are commonly introduced in evidence. In such cases, the trier of fact must determine the truthfulness of the witness solely from a written transcript, and they have little difficulty in doing so. See California v. Green, 399 U.S. 149, 26 L. Ed. 2d 489,

90 S. Ct. 1930 (1970); Ohio v. Roberts, ___ U.S. ___, 65 L. Ed. 2d 597, 100 S. Ct. ___ (1980) Appellate courts never observe the demeanor of witnesses, yet such courts commonly make findings of fact based on the written record. This Honorable Court has held that such findings of fact by Appellate courts are due the same presumption of correctness that attends findings by trial courts which do observe the demeanor of witnesses. Sumner v. Mata, ___ U.S. ___, 66 L. Ed. 2d 722, 101 S. Ct. ___ (1981). Obviously, this Honorable Court considers it quite acceptable to make credibility findings on written records. Therefore, in ruling that the District Court could not determine credibility without actually viewing the witnesses, the United States Court of Appeals ruled contrary to this Honorable Court's prior decisions.

II.

THE DISTRICT COURT SHOULD BE PERMITTED TO REQUEST AN ARTICULATION OF CREDIBILITY FINDINGS OR A FINDING UNDER THE CORRECT STANDARD BY THE STATE COURT RATHER THAN CONDUCTING AN ENTIRELY NEW HEARING

(A NOVEL QUESTION)

The State Court, as discussed above, conducted a most thorough hearing in this case. The Court of Appeals found no deficiencies in the hearing itself. The Court of Appeals ordered an entirely new hearing in Federal Court solely because the State Court did not articulate its credibility findings and because of the standard used by the State Court to determine the ultimate issue. An entirely new hearing in Federal Court would be a wasteful duplication of hearings. If the problem can be resolved by an articulation of credibility findings why not let the District Court request one. If the defect in the State court proceedings was

the application of the wrong standard in deciding the ultimate issue, why not allow the District Court to request that the State Court reconsider its holding in light of the correct standard. The State trial judge heard the evidence and has available to him a transcript of the evidence if his memory needs refreshing. Such a procedure would place little additional burden on the State court, which after all caused the problem by applying the wrong standard in the first place. It would also avoid wasting the resources of the Federal District Court in duplicating a perfectly acceptable State Court proceeding.

This Honorable Court has never addressed this question, but ought to do so.

III.

DID HARRIS' "MISLEADING" THE COURT AS TO THE REASONS FOR HIS PLEA CONSTITUTE A WAIVER OF HIS PRESENT CLAIM?

(A NOVEL QUESTION)

The undisputed evidence[10] in this case shows that when Harris entered his pleas of guilty in 1971 he was advised of his constitutional rights and the consequences of his plea both orally and in writing. He was examined by the Court and urged to address questions to the Court. Harris advised the Court that he understood his rights and the consequences of his plea, that he was under no duress and that he was pleading guilty because he was guilty. On this basis the Court accepted Harris' guilty pleas. Then years later Harris comes into Court

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[10]Harris admitted being examined by the Court. His claim of being unable to recall what was said does not amount to a denial of the other evidence to the effect that the judge orally advised and examined Harris at the time of the plea.

and claims that what he told the court at the time of his guilty pleas was false, that he is actually an innocent man who was forced to plead guilty because of things said to him by his lawyers within the privacy of the Attorney-client relationship. This situation presents a dilemma. If what Harris told the Court at the time of his plea was true, then his present claim is false, and he is due no relief. If his present claim is true, then Harris affirmatively misled the Court at the time of his pleas. Can a party lead a Court into accepting a guilty plea by false statements, and then later attack the plea on the grounds that the Court was misled?

This Honorable Court has considered the question of the effective assistance of counsel on guilty pleas on several occasions. Brady v. United States, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct.

1463 (1970); McMann v. Richardson, 397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970); Parker v. North Carolina, 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458 (1970); Tollett v. Henderson, 411 U.S. 258, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973) However, each of these cases involved guilty pleas entered years before this Honorable Court's decision in Boykin v. Alabama (395 U.S. 238, 23 . Ed. 2d 274, 89 S. Ct. 1709 [1969]).[11] In addition none of these cases involved a defendant who affirmatively misled the Court.

Boykin drastically altered guilty plea procedures by requiring the trial judge to, in effect, supercede counsel and advise and examine the defendant

---

[11]The plea in Brady was entered in 1959, that in McMann in 1959, that in Parker in 1964, and that in Tollett in 1948.

himself and make his own determination of the voluntariness and intelligence of the proposed guilty plea before accepting it. It is this requirement which gives rise to the present situation. The accused who wants to plead guilty must affirmatively respond to the Court's inquiries, silence is not enough. The pleading party must affirmatively convince the judge that he knows what he's doing and is doing it of his own accord or the plea must be rejected.

Harris does not claim and has never claimed a violation under Boykin. His claim is that his lawyers coerced and manipulated his plea. However, given admitted Boykin compliance and Harris' own admission that the judge conversed with him, this claim cannot stand. Under Boykin, once a guilty plea is offered, the lawyers step into the background, and the judge must personally advise and

examine the accused. If, during his admitted conversation with the trial judge, Harris had given the slightest hint of his present claim or even asserted his innocence as he now does, the guilty plea would have been rejected. To get the trial judge to accept his guilty plea Harris had to convince His Honor that he understood his rights and the consequences of his plea and that he was voluntarily pleading guilty because he was guilty. Having succeeded in this endeavor, can Harris come back to Court years later and say: "I fooled you! Everything I told you was false."? Can he on such a claim succeed in withdrawing his guilty pleas and obtaining a trial, when the passage of time may have deprived the State of its evidence.[12]

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[12]This Honorable Court has recognized delayed trials are as bad for society as they are for the accused. Barker v. Wingo, 407 U.S. 514, 519 ff, 33 L. Ed. 2d 101, 110 ff, 92 S. Ct. 2182 (1972)

Commonsense would answer these questions in the negative. If a party misleads a court, he should certainly not be allowed to later complain that the Court was misled. Judgments based on guilty pleas are said to be the most final of all judgments. Yet, if defendants are allowed to withhold information from and mislead the Court at the time of their guilty pleas and then later take advantage of the fact, guilty pleas would become voidable almost at will. A guilty plea would become a maneuver whereby a party could delay his trial until he is reasonably certain that the State cannot prove its case and then demand that his plea be set aside.

Harris cannot claim that he was unaware of the now claimed facts at the time of his plea. On the other hand, it cannot be said that the trial judge or the prosecution knew or should have known

of these alleged facts. Harris' claim arose within the confidential attorney-client relationship. In fact, Harris' lawyers testified that the did not subpoena witnesses for the express purpose of keeping the State in the dark as to their defense.

This case presents an important question which this Honorable Court has had no opportunity to address. The writ should issue in this case so that this question can be addressed and resolved.

CONCLUSION

In conclusion the Petitioner respectfully submits that this case presents important questions of Federal Constitutional Law which have not been but ought to be decided by this Honorable Court and conflicts with prior opinions. For these reasons the Petitioners pray that this Honorable Court will issue the

writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decison of said Court.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Joseph Oliver, Warden, Petitioner, do hereby certify that on this ____ day of _____, 1981, I did serve the requisite number of copies of the foregoing on the Attorneys for Johnny Harris, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Eleanore M. Garger, Esquiress
Paul Soreff, Esquire
William H. Allison
Allison, Soreff & Garber
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64 N. Union Street
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Appendix

Office Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

81-313

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980

JOSEPH OLIVER, WARDEN
HOLMAN PRISON, ALABAMA

Petitioner

V.

JOHNNY HARRIS,

Respondent

APPENDIX

TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
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ATTORNEYS FOR PETITIONERS

TABLE OF APPENDICES

PAGE

APPENDIX "A", ORDERS AND OPINIONS OF THE DISTRICT COURT..... 1

JUDGMENT..... 1

MEMORANDUM OPINION..... 2

REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT..... 6

APPENDIX "B", OPINIONS AND ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B..... 40

OPINION..... 40

DENIAL OF REHEARING..... 56

APPENDIX "C", 28 UNITED STATES CODE 2254..... 60

APPENDIX "D", OPINIONS OF THE ALABAMA APPELLATE COURTS..... 67

OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA..... 67

ORDER OF THE SUPREME COURT OF ALABAMA..... 108

CERTIFICATE OF SERVICE..... 110

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHNNY HARRIS,	)	
	)	
Petitioner,	)	
	)	
-Vs-	)	CV-78-A-0278-S
	)	
JOSEPH OLIVER,	)	
Warden, et al.,	)	
	)	
Respondents.	)	

J U D G M E N T

In conformity with the magistrate's recommendation heretofore filed in this cause and in conformity with the Memorandum Opinion filed contemporaneously herewith, it is hereby ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed by Johnny Harris be and the same hereby is DENIED.

DONE, this 27th day of Feb. -, 1980.

/s/ C. W. ALLGOOD
SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHNNY HARRIS,	)	
	)	
Petitioner,	)	
	)	
-Vs-	)	CV-78-A-0278-S
	)	
JOSEPH OLIVER,	)	
Warden, et al.,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

This case is before the court on a petition for habeas corpus filed by the petitioner in which he claims a constitutional infirmity in five (5) life sentences imposed upon him in the Circuit Court of Jefferson County, Alabama. This matter was referred to a magistrate of the court for preliminary review. The magistrate has submitted a recommendation

to this court in which the facts and legal issues are analyzed.

Petitioner, by and through counsel, has filed objections to the magistrate's report and recommendation and the respondent, by and through the Attorney General of the State of Alabama, has filed a response to the petitioner's objections to the magistrate's report and recommendation.

The essential issues in this case are, Did petitioner enter a voluntary, intelligent and knowing plea of guilty? did the petitioner receive reasonably effective assistance of counsel in connection with the plea of guilty entered by him?

All of the pertinent authorities bearing on these issues are referred to in the magistrate's recommendation. They need not be repeated here. The court will restate, however, the applicable and

controlling principles of law upon which this court's decision will be based. A plea of guilty knowingly and intelligently entered by a defendant constitutes a waiver of all irregularities, should there be any, in matters preceding the acceptance of a plea of guilty. The performance of an attorney must not be judged with the luxury of hindsight as to acts and decisions taken by an attorney at the time the event in question occurred; but, on the contrary, a reviewing court must determine whether, in this case court-appointed counsel, were expected to and did render reasonably effective assistance. Judged by these standards and in accordance with the many authorities referred to in the magistrate's opinion, this court finds based upon all the pleadings and exhibits in this case that court-appointed counsel for this petitioner rendered reasonably

effective assistance. The court further finds, based upon all the pleadings and exhibits in this case including the lengthy transcript of a coram nobis hearing, that the pleas of guilty in question were intelligently and voluntarily offered by petitioner and accepted by the court. The court further finds that this petitioner was not denied his right of appellate review.

The magistrate's recommendation that this petition for habeas corpus be denied is hereby adopted and approved. An appropriate judgment will be entered.

DATED this 27th day of Feb, 1980.

/s/C. W. ALLGOOD
SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHNNY HARRIS,	)	
	)	
Petitioner	)	
	)	
-Vs-	)	CIVIL ACTION
	)	78-A-0278-S
JOSEPH OLIVER,	)	
Warden, et al.,	)	
	)	
Respondents	)	

REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT

Johnny Harris, petitioner, is an inmate of the Alabama Prison System. This case is now before the Court on a petition for habeas corpus as amended. In this action, petitioner attacks five (5) separate sentences of life imprisonment imposed upon him in the Circuit Court of Jefferson County, Alabama. Before discussing the issues before this Court, it will be helpful in the opinion of the

magistrate to first summarize the status of the pleadings and the sequence of events in the state courts of Alabama.

STATUS OF THE PLEADINGS

The petition for habeas corpus was filed by the petitioner in the United States District Court for the Southern District of Alabama. Since the sentences complained of were imposed upon petitioner in the Northern District of Alabama (Jefferson County), the habeas petition was transferred to the Northern District of Alabama and was filed herein under the above docket number.

The undersigned magistrate of this Court issued an Order to Show Cause directing the respondents to appear and show cause why the relief requested by the petitioner should not be granted. A response was filed by the respondents to the magistrate's Order to Show Cause.

During the pendency of the habeas corpus action filed by the petitioner, petitioner sought coram nobis relief in the Circuit Court of Jefferson County, Alabama. Further proceedings in this action were held in abeyance, by order of this Court, pending the completion of the exhausting of state remedies.

Petitioner, by and through his attorneys of record, filed an amended petition for habeas corpus. The respondents were directed to file a response to the amended petition for habeas corpus. This response has been filed.

Petitioner has filed a motion for discovery pursuant to Rule 6, Federal Rules Governing 2254 Cases.

The issues now before this Court are the issues raised in the petition for habeas coprus as amended and the petitioner's motion for discovery pursuant to Rule 6, supra.

SEQUENCE OF EVENTS IN THE STATE COURTS OF ALABAMA AND ISSUES RAISED BY THE PETITION FOR HABEAS CORPUS AS AMENDED

On August 12, 1970, warrants were issued for the arrest of the petitioner in five (5) separate cases. Petitioner was charged as follows:

1) Robbery of Clyde Blaylock

2) Rape of Anne Wailes

3) Robbery of Clyde Blaylock

4) Robbery of Janice Sue Best

5) Robbery of Anne Wailes

The maximum penalty which could have been imposed in each of the five (5) cases was the death penalty. An indictment was returned against the petitioner by a grand jury for the Circuit Court of Jefferson County in each of the cases referred to above.

On April 6, 1971, petitioner, represented by court-appointed counsel, entered a plea of guilty in each of the aforesaid cases. Under the terms of a plea

agreement, petitioner received a life sentence in each of said cases.

On February 28, 1975, petitioner, who was then an inmate of the Alabama Prison System serving sentences in the cases enumerated above, was convicted of First Degree Murder in the State Courts of Alabama and sentenced to death. This death sentence was imposed upon petitioner under the provisions of §113175, Alabama Code of 1975, which said Code section prescribes a mandatory death penalty for a convict serving a life sentence who is convicted of First Degree Murder. The aforesaid conviction occurred in the Circuit Court of Baldwin County, Alabama. In the petition for habeas corpus filed in this Court, petitioner is attempting to vacate and set aside the life sentences imposed upon him in the Circuit Court of Jefferson County by thereby eliminating the applicability

of the mandatory death penalty sentence as provided in the Code of Alabama, § 13175.

Petitioner was sentenced on the five (5) cases in Jefferson County, Alabama on April 6, 1971. In 1973, petitioner filed a pro se petition for writ of error coram nobis in the Circuit Court of Jefferson County, Alabama. In this action, petitioner, among other things, claimed that his pleas of guilty in said cases were not voluntary. The coram nobis action was dismissed by the Circuit Court of Jefferson County without an evidentiary hearing on May 4, 1973. No appeal was taken from the denial of coram nobis relief.

In the original petition for habeas corpus filed by the petitioner in this court, petitioner made the following allegations as the basis for the relief sought: Involuntary plea of guilty and

incompetent counsel. 1/

The acceptance by the court of a voluntary and understanding plea of guilty is a waiver of all defects occurring prior to the plea and do not affect the jurisdiction of the Court. The magistrate's recommendation will be limited to the question of the voluntariness of petitioner's guilty plea and the competency of court-appointed counsel.

As indicated hereinabove, petitioner instituted a second coram nobis proceeding in the Circuit Court of Jefferson County on February 17, 1978 attacking the five (5) life sentences imposed upon him in the Circuit Court of Jefferson County,

---

1/In addition to the grounds which are referred to above, petitioner also claimed an illegal arrest, suggestive line-up identification, joinder of cases for trial, jury selection system, failure to provide the petitioner with evidence favorable to him, and failure to advise the petitioner of his right to appeal from his guilty pleas.

Alabama, The basis for relief alleged by petitioner in the aforesaid coram nobis actions is substantially identical with the basis of petitioner's claim for relief in the instant case. An evidentiary hearing which consumed five court days was held on petitioner's coram nobis action. On April 19, 1978, the Circuit Court of Jefferson County, Alabama, issued its order denying relief. Petitioner appealed from the denial of coram nobis relief, and the action of the Circuit Court of Jefferson County denying relief was affirmed on October 31, 1978. Harris v. State, 367 So. 2d 524 (1978); Cert. den. 367 So. 2d 534 (1979). The Supreme Court of Alabama has denied certiorari. State remedies have been exhausted. The issues raised in the amended petition for habeas corpus are essentially the same as those raised in the original petition. The only ground

asserted by petitioner in addition to those originally claimed by him is petitioner's allegation that he did not have a full and fair evidentiary hearing in the Circuit Court of Jefferson County. Petitioner bases this allegation on his contention that petitioner was not able to subpoena all witnesses he wished to subpoena, was not able to subpoena records of the prosecuting attorney and police department, and was not permitted to offer evidence as to his innocence of the crimes charged in the five (5) indictments to which petitioner entered a plea of guilty in the Circuit Court of Jefferson County.

It is the magistrate's recommendation that the Court limit its inquiry to the following areas:

1) Was petitioner's plea of guilty to the five (5) capital cases in Jefferson County, Alabama volun-

tarily made with a full understanding of the charges against him and the consequences of a guilty plea?

2) Did petitioner receive reasonably effective assistance of counsel?

3) Did the petitioner receive a full and fair evidentiary hearing in his coram nobis action in the Circuit Court of Jefferson County?

Following the coram nobis hearing in the Circuit Court of Jefferson County, Alabama, the Circuit Court entered its Decree denying relief. The Decree of the Circuit Court of Jefferson County contained detailed findings of fact and conclusions of law which may be summarized as follows: Petitioner was indicted by a grand jury of Jefferson County, Alabama, during its October session of 1970 on

four (4) charges of Robbery (case numbers 21835, 21837, 21838 and 21839) and one (1) charge of Rape (case number 21836). The maximum punishment in each of the above-mentioned cases was death. (The indictments in these cases were returned and the cases were disposed of prior to the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 ( )).

On November 24, 1970, Louis Scholl and Milton Garrett were appointed to represent petitioner. Mr. Scholl was appointed in cases numbered 21835, 21836 and 21837. Mr. Garrett was appointed to represent the petitioner in cases numbered 21838 and 21839. The petitioner was arraigned on January 29, 1971 in each of the aforesaid cases. Petitioner entered a plea of not guilty.

On April 5, 1971, each of the aforesaid cases were marked "ready for trial."

Case number 21836 -Rape -was initially called for trial on April 6, 1971.

While the court was in the process of qualifying the jury, petitioner, through his court-appointed counsel, requested a delay in the proceedings to enable petitioner to confer with his counsel. After a conference between petitioner and his counsel, the court was advised that the petitioner wished to enter a plea of guilty in each of said cases. Petitioner's plea of guilty was accepted, and a life sentence was imposed in each case pursuant to a plea recommendation from the prosecution.

On March 7, 1978, United States District Court for the Southern District of Alabama granted petitioner a stay of execution for a period of sixty (60) days and ordered the petitioner to file all proposed petitions by March 21, 1978. (The stay of execution was in connection

with the death sentence imposed in the Circuit Court of Baldwin County, Alabama.) In ordering the stay of execution, the District Judge for the Southern District of Alabama directed all parties and courts to proceed with an adjudication of petitioner's pleadings as promptly as possible. The petition for writ of error coram nobis as amended was filed on March 21, 1978. The evidentiary hearing commenced on April 6, 1978.

The Circuit Court of Jefferson County, Alabama denied motions filed by petitioner for appointment of counsel and to provide funds for investigative and hearing purposes. The Circuit Court of Jefferson County found that in the coram nobis action petitioner was represented by volunteer attorneys who competently represented petitioner.

In its Decree, the Circuit Court of Jefferson County stated as follows:

> A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a person admits in Open Court that he is in fact guilty of the crime or crimes with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann v. Richardson, 397 U.S. 759:
>
> > In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of defendant's confession.

The Circuit Court of Jefferson County, Alabama further said:

> Once the defendant chooses to by-pass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a

> legitimate expectation of finality in the conviction thereby obtained. Lefkowitz v. Newsome, 420 U.S. 283; McMann v. Richardson, supra.

In reaching its conclusion as to whether the petitioner received effective assistance of counsel in connection with his pleas of guilty, the Circuit Court of Jefferson County applied the wrong test. The Circuit Court of Jefferson County applied the "farce and mockery" test in accordance with Williams v. Beto, 354 F. 2d 698 (5th Cir. 1965). The farce or mockery test is no longer valid in the Fifth Circuit. The proper test is whether court-appointed counsel were expected to and did render reasonably effective assistance of counsel. Fitzgerald v. Estelle, 505 F. 2d 1334 (5th Cir. 1974); McKenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960). Even though the Circuit Court of Jefferson County applied an erroneous test to determine whether

petitioner received reasonably effective assistance of counsel, it is the magistrate's opinion that the ultimate finding by the Circuit Court of Jefferson County that petitioner did receive reasonably effective assistance of counsel is amply supported by the record in the coram nobis proceeding and the affidavits of court-appointed counsel which appear in the initial response filed by the respondents to the magistrate's Show Cause Order.

After petitioner's arrest, several different attorneys were appointed to represent him at one time or another prior to his indictment. A preliminary hearing was waived on petitioner's behalf by one of these court-appointed counsel, John Prince. The record concerning what transpired prior to indictment is sketchy at best. It is the magistrate's opinion, however, that the court need not consider

these matters for the reason that this Court's decision must be based upon whether petitioner's pleas of guilty were intelligently and voluntarily offered by him and whether petitioner received the reasonably effective assistance of counsel prior to offering his pleas of guilty.

As indicated above, after petitioner was indicted in the five (5) cases now under attack, Louis Scholl and Milton Garrett were appointed to represent him. The two appointed counsel agreed between themselves to make a joint investigation with respect to all five (5) cases. By agreement between the attorneys, Mr. Garrett took the lead in investigation and discovery. The two court-appointed counsel discussed the facts in all the cases on numerous occasions. Prior to the time the cases were called to trial, the prosecution offered to recommend to

the court that in the event a plea of guilty was offered the prosecution would recommend a life sentence in each case. Court-appointed counsel communicated this offer to the petitioner who initially replied we will try all five (5) cases. There was no further plea discussion prior to the time the Rape case was called for trial.

During the jury selection process, the petitioner, according to court-appointed counsel, inquired of court-appointed counsel as follows: "Do you still think you could get me five (5) life sentences?" Petitioner was asked by court-appointed counsel why he would consider changing his position at this point. According to court-appointed counsel's recollection, petitioner replied, "They have me cold on (3) cases, and I don't want to sit through five (5) trials." At this point, court-appointed

counsel requested a brief recess. The court instructed court-appointed counsel to apprise the defendant of his rights, go over them with him and to have him sign a guilty plea form. Copies of the guilty plea form are attached to the initial response made the by the respondents to the magistrate's Show Cause Order. These forms contain the maximum limit of punishment in each of said cases and a complete description of the rights of the petitioner including his right to trial by jury, his right to testify as a witness if he so desired, his corresponding right not to testify, and his absolute right to remain silent, and the fact that his conversations with his attorney are confidential and could not be disclosed. In addition, the form advises the defendant of his right to subpoena witnesses, to cross-examine witnesses for the prosecution, and the obligation of his attor-

neys to do everything honorably and reasonably to insure a fair and impartial trial and his right to have witnesses subpoenaed to testify for the defense. In addition, this form advised the petitioner of the presumption of innocense and the requirement that the prosecution establish his guilty beyond reasonable doubt. This form also advised the defendant of his right to adhere to his plea of not guilty or any other special plea he desires to make and that if his plea of guilty is accepted there would be no trial. A guilty plea form was prepared in each of the five (5) cases pending against petitioner. Each form was read to the petitioner by court-appointed counsel and signed by the petitioner. The form was also signed by court-appointed counsel and by the Circuit Judge. After the forms were executed, the presiding judge directed an inquiry

to court-appointed counsel as to whether they had gone over the forms with petitioner. A similar question was addressed to the petitioner directly by the presiding judge, and the petitioner informed the court that the guilty plea forms had been read and explained to him. The presiding Judge went over the forms with petitioner, and in discussion with petitioner, determined that petitioner did, in fact, sign each guilty plea form with the understanding of their contents. The presiding judge also ascertained from petitioner that his decision to execute the guilty plea forms was voluntary and that no one had coerced him.

As indicated above, it was agreed between the court-appointed counsel that Mr. Garrett would be responsible primarily for investigation of all five (5) cases. Mr. Garrett estimated that he spent between 60 and 75 hours on investigation of the charges against petitioner. Mr. Garrett visited petitioner on seven

different occasions. Petitioner gave Mr. Garrett a list of ten witnesses. Mr. Garrett contacted eight of the ten witnesses and received detailed statements from all eight. Mr. Garrett determined from his investigation that each witness except one attempted to establish an alibi for the petitioner at the time of the rape. The statement of each, however, as alibi witnesses was in conflict with the statements given by other so-called alibi witnesses. Two of the witnesses whose names were given to Mr. Garrett by the petitioner were out-of-state and could not be located.

Mr. Garrett determined from investigation with the police department that numerous articles were recovered from petitioner's home that were subsequently identified by victims. Two of the victims were interviewed by Mr. Garrett; each of them stated that they could

personally identify petitioner. Mr. Blaylock, one of the victims, stated he could positively identify Johnny Harris because he was robbed on two occasions by the petitioner.

Mr. Garrett informed the petitioner that if the so-called alibi witnesses testified in accordance with the information furnished to Mr. Garrett that the result would be disastrous due to the inconsistency of the information furnished by the alibi witnesses. Petitioner then informed Mr. Garrett to get the best deal available. From that point on, the petitioner never maintained his innocence to Mr. Garrett. It is Mr. Garrett's recollection that the petitioner's decision to plead guilty was his own decision free of any coercion of any court-appointed counsel and that petitioner independently reached this decision after being made aware of the results of Mr. Garrett's

investigation.

It is the magistrate's opinion that the Circuit Court of Jefferson County, Alabama, is in compliance with Boykin v. Alabama, 395 U.S. 238 in accepting a plea of guilty from this petitioner in the five (5) cases discussed above. Both court-appointed counsel and the court completely explained all of petitioner's rights to him and the consequences of a plea of guilty. Petitioner acknowledged that this had been done in writing.

> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is intelligent and therefore vulnerable when motivated by a confession erroneously though admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's adivce to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.

McMann v. Richardson, 397 U.S. 759 (1970).

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice received from counsel was not within the standards set forth in McMann.

Tollett v. Henderson, 411 U.S. 258 (1973). See in this connection Brady v. U.S., 397 U.S. 742 (1970).

All the exhibits in this case, including the transcript of the coram nobis proceedings, reflect that petitioner was on a continuing basis advised by court-appointed counsel of the progress and results of the investigation made by court-appointed counsel and that based upon this information, petitioner intelligent-

ly and without coercion elected to acknowledge his guilt in open court. It is also apparent that the advice given to petitioner and the information conveyed to him by court-appointed counsel was within the "range of competence demanded of attorneys in criminal cases." Tollette v. Henderson, supra. See also in this connection McMann v. Richardson, 397 U.S. 759 (1970).

Another contention made by this petitioner is his allegation that he was not advised by the court of his right to appeal and that he received incorrect advice from his court-appointed attorney concerning his right to appeal from the sentences imposed after the entry of a plea of guilty. The failure to advise a defendant of his right to appeal after a plea of guilty does not present a federal Constitutional question. Williams v. U.S., 443 F. 2d 1151 (5th Cir. 1971).

However, if a defendant represented by court-appointed counsel or retained counsel makes known his desire to appeal and this request is not carried out, it is a possible constitutional violation. Daniel v. Alabama, 487 F. 2d 887 (5th Cir. 1973). The transcript of the evidence at the coram nobis proceeding contains meager information concerning this issue raised by petitioner. In petitioner's testimony petitioner claimed after his plea of guilty was accepted by the court and sentence was imposed upon him in the five (5) cases now under attack he inquired of Mr. Garrett, one of his court-appointed counsel, as to the availability of appeal. It is petitioner's testimony further that Mr. Garrett replied that no appeal was available from his guilty plea. In Mr. Garrett's testimony at the coram nobis hearing, Mr. Garrett testified that based upon his

notes and his recollection there was no discussion with petitioner concerning a possible appeal following petitioner's plea of guilty. However, the only issue available for appellate review in such an appeal is the validity of the indictment, the constitutionality of the statute and the voluntariness of the pleas of guilty or any other issue which would deprive the court of jurisdiction. It is the magistrate's recommendation that this court determine that petitioner's pleas of guilty were intelligently and voluntarily tendered by him to the court. Having intelligently and voluntarily acknowledge his guilt in open court, it is inconceivable that petitioner would have desired to appeal based on the limited scope of appellate review. An attorney who was convinced as to the regularity of the guilty plea and without knowledge of any facts divesting the court of jurisdiction

would advise a client who had entered a plea of guilty that an appeal would be fruitless. The petitioner was represented by able counsel in the state coram nobis proceeding. Their opportunity to elicit facts from petitioner and his court-appointed counsel on this and other issues was not limited or restricted by the Circuit Court of Jefferson County, Alabama. There is no reason to believe that an additional hearing could shed any light on this issue. It is therefore recommended that this Court find that petitioner was not denied his right to seek appellate review in violation of the Constitution of the United States by the conduct of his court-appointed counsel following petitioner's voluntary and intelligent pleas of guilty.

The only remaining issue before this Court is petitioner's motion to be allowed to resort to discovery pursuant to

discovery pursuant to Rule 6, Rules Governing 2254 Cases. This Rule provides in pertinent part as follows:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

The language of Rule 6 and the Advisory Committee Note (28 U.S.C. foll. 2254) point out that granting discovery is left to the discretion of the court. The discovery sought by the petitioner in his motion is related primarily to the obtaining of factual information preceding petitioner's plea of guilty. It is the opinion of the magistrate that the sole issue before this Court is whether petitioner's pleas of guilty in the five (5) cases under attack were voluntarily and intelligently offered by him and whether the advice given to him

by court-appointed counsel was reasonably effective. It is further the magistrate's opinion that the evidentiary hearing accorded petitioner in his coram nobis proceeding was full, fair and complete and that no additional discovery is required with reference to the issues before this Court. It is therefore RECOMMENDED that petitioner's motion for discovery pursuant to Rule 6 be DENIED.

SUMMARY

Reasonably effective assistance is an easier standard to meet in the context of a guilty plea than in a trial, but counsel still must render competent service. See Tolbert v. Henderson, 1973, 411 U.S. 258, 93 S.Ct., 1602, 36 L.Ed.2d 235. It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly. Lamb v. Beto, 5th Cir. 1970, 423 F. 2d 85, 87, cert. denied, 400 U.S. 846, 91 S. Ct. 93, 27 L. Ed. 2d 84. See Walker v. Caldwell, 5th Cir. 1973 476 F. 2d 213; Colson v. Smith, 5th Cir. 1971, 438 F. 2d 1075; O'Neal v. Smith, 5th Cir. 1970, 431 F. 2d 646. He must actually and substantially assist his

> client in deciding whether to plead guilty. Walker v. Caldwell, supra, 476 F. 2d at 224. It is his job to provide the accused an 'understanding of the law in relation to the facts.' Id. at 218. The advice he gives need not be perfect, but it must be reasonably competent. Colson v. Smith, supra, 438 F.2d at 1081 n.5. His advice should permit the accused to make an informed and conscious choice. Id. at 1079. In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimum level. . . .

Herring v. Estelle, 491 F. 2d 125 (5th Cir. 1974).

It is the magistrate's opinion that the transcript of the coram nobis proceeding and the other exhibits and pleadings in this case establish that the representation given this petitioner by court-appointed counsel satisfies that requirement of Herring v. Estelle. It is

further the magistrate's opinion that this Court determine that the pleas of guilty offered by this petitioner in the five (5) cases now under attack were intelligently and voluntarily tendered by the petitioner with full understanding of the charges against him and of his rights. It is RECOMMENDED that the Court determine that the evidentiary hearing accorded petitioner was full, fair and complete and that no further evidentiary hearing is necessary.

It is therefore RECOMMENDED that the petition for habeas corpus filed by Johnny Harris be DENIED.

The Clerk will furnish the petitioner with a copy of this Recommendation by mailing a copy to his attorneys of record. The Clerk will also furnish petitioner with a copy of this Recommendation. A copy of this Recommendation will be furnished to the Attorney General of

the State of Alabama. Any objection or exception to the magistrate's Recommendation should be filed within ten (10) days from the receipt thereof.

DATED this 15th day of January, 1980.

/s/ R. MACEY TAYLOR
R. MACEY TAYLOR
UNITED STATES
MAGISTRATE

APPENDIX B

Johnny HARRIS, Plaintiff-Appellant,

v.

Joseph OLIVER, Warden of the Holman Unit Prison et al., Defendants-Appellees.

No. 80-7240.

United States Court of Appeals
Fifth Circuit.
Unit B

May 18, 1981.

The United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., entered judgment denying petition for writ of habeas corpus, and appeal was taken. The Court of Appeals, Vance, Circuit Judge, held that absence of findings in state court coram nobis proceeding as to disputed, historical facts, coupled with reliance by state court on erroneous legal standard for determining effectiveness of counsel's

assistance, rendered record of the state court proceeding insufficient basis for denial, without hearing, of the petition.

Vacated and remanded with instructions.

1. Habeas Corpus 59

Absence of findings in state court coram nobis proceeding as to disputed, historical facts, coupled with reliance by state court on erroneous legal standard for determining effectiveness of counsel's assistance, rendered record of the state court proceeding insufficient basis for denial, without hearing, of petition for writ of habeas corpus. 28 U.S.C.A. § 2254(d).

2. Habeas Corpus 85.5(4, 11)

Record did not compel finding that habeas corpus petitioner was denied effective assistance of counsel in state criminal proceedings or that his pleas of

guilty were not informed and voluntary.

3. Criminal Law 627.5(2)

Denial of defendant's discovery request was within discretion of trial court and was not matter of right.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, FAY and VANCE, Circuit Judges.

VANCE, Circuit Judge:

On pleas of guilty petitioner was convicted in the state courts of Alabama in 1971 of four counts of robbery and one of rape. He received five consectutive life sentences. At the time of his conviction each of the carges carried a maximum penalty of death. Petitioner was represented by two court-appointed attorneys who cooperated in the handling of all five cases. The sentences were

agreed to by plea agreement reached when the first of the cases was called for trial on April 6, 1971 and the court was in the process of qualifying the jury.

In 1975 while petitioner was serving the sentences as an inmate in the Alabama prison system, he was convicted of murder under Ala. Code § 13-1-75 (1975) and sentenced to the mandatory death penalty prescribed by that section.

By this petition for habeas corpus petitioner seeks to have his life sentences vacated and set aside on the theory that applicability of the mandatory death penalty sentences provided in § 13-1-75 will thereby be eliminated. In a separate proceeding not now before this court, he attacks his murder conviction.[1]

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[1]At the time of oral argument a second petition for Writ of Error Coram Nobis attacking petitioner's 1975 conviction and death sentence was pending before the state trial court in Baldwin County, Alabama.

Prior to the filing of his petition for writ of habeas corpus in the district court, petitioner had exhausted his state remedies by petition for writ of error coram nobis. An evidentiary hearing held by the state trial court consumed five days. Its order denying relief was appealed by petitioner and affirmed. Harris v. State, 367 So. 2d 524 (Ala. Cr. App. 1978), cert. denied, 367 So. 2d 534 (Ala. 1979).

The present petition was referred by the district judge to a United States magistrate who, without a hearing, recommended that the petition be denied. The magistrate's detailed opinion reflected a meticulous examination of the lengthy state court record. The recommendation was adopted and approved and the district court denied the petition.

On appeal petitioner advances four primary contentions: (1) that the dis-

trict court erred in finding that he had received reasonably effective assistance of court-appointed counsel in connection with his pleas of guilty; (2) that the district court's finding that his pleas of guilty were informed and voluntary was clearly erroneous; (3) that he was not afforded a full and fair hearing during the state coram nobis proceeding; and (4) that the district court abused its discretion when it denied petitioner's request for discovery. We conclude that the third of Harris' contentions necessitates a remand to the district court for an evidentiary hearing.

[1] Our consideration centers on the state trial judge's decree dated April 19, 1978 denying the petitions for writ of error coram nobis. The state circuit judge conducted an extensive hearing, but his decree did not include explicit findings of fact. The findings were in the

nature of conclusions only. Although they might otherwise be sufficient, they are flawed by the statement of applicable law recited by the state judge immediately prior to his critical finding:

In Williams v. Beto, 354 F. 2d 698, 704 (5th Cir. 1965), the Fifth Circuit Court of Appeals said:

> It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory or without adequate opportunity for conference and preparation.

The recitation is not a correct statement of the applicable standard. The standard now recognized in this circuit is that of "reasonably effective assistance." In Herring v. Estelle, 491 F. 2d 125 (5th Cir. 1974), we stated:

> Reasonably effective assistance is an easier standard to meet

in the context of a guilty plea than in a trial, but counsel still must render competent service. See Tollett v. Henderson, 1973, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235. It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly. Lamb v. Beto, 5th Cir. 1970, 423 F. 2d 85, 87, cert. denied, 400 U.S. 846, 91 S.Ct. 93, 27 L. Ed. 2d 84. See Walker v. Caldwell, 5th Cir. 1973, 476 F. 2d 213; Colson v. Smith, 5th Cir. 1971, 438 F.2d 1075; O'Neal v. Smith, 5th Cir. 1970, 431 F. 2d 646. He must actually and substantially assist his client in deciding whether to plead guilty. Walker v. Caldwell, supra, 476 F. 2d at 224. It is his job to provide the accused an "understanding of the law in relation to the facts." Id. at 218. The advice he gives need not be perfect, but it must be reasonably competent. Colson v. Smith, supra, 438 F. 2d at 1081 n.5. His advice should permit the accused to make an informed and conscious choice. Id. at 1079. In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that

required minimal level.[6]

> [6]"Effective counsel includes familiarity of counsel with the case and an opportunity to investigate it if necessary in order meaningfully to advise the accused of his options."

Id. at 128 (citation omitted).

The magistrate recognized that the state court had misstated the applicable standard but held,

> [I]t is the magistrate's opinion that the ultimate finding by the Circuit Court of Jefferson County that petitioner did receive reasonably effective assistnace of counsel is amply supported by the record in the coram nobis proceeding. . . .

Despite the magistrate's careful examination of the record, such a conclusion does not form sufficient basis for denial of the petition without a hearing.

Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), sets forth the criteria for determining when a federal habeas court may adopt the

factual findings of a state court without conducting an evidentiary hearing.[2] Among the mandates defined by Townsend is that a federal hearing must be held unless the state court trier of fact has after a full hearing reliably found the relevant facts. Id. at 312-13. Accord, Thomas v. Beto, 452 F. 2d 1072, 1074 n.1 (5th Cir. 1971), cert. denied, 409 U.S. 853, 93 S. Ct. 186, 34 L. Ed. 2d 97 (1972); Randel v. Beto, 354 F. 2d 496, 503 (5th Cir. 1965), cert. denied, 387 U.S. 935, 87 S. Ct. 2058, 18 L.Ed.2d 996 (1967). If purely historical facts are found which are uncontaminated by legal error, the federal court may rely on such state findings. Even if no express findings are made it may still be possible for the federal court to rely on

---

[2]The standards of Townsend v. Sain have been incorporated into 28 U.S.C. § 2254(d).

facts impliedly found provided that the constitutional claim was decided on the merits. Townsend recognizes, however, that this inference of factual findings is impossible where the state court has used an incorrect legal standard:

> Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circustances the District Court cannot ascertain whether the state could found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts.

372 U.S. at 314, 83 S. Ct. at 757. The Court went on to note:

> Of course, under Rogers v. Richmond [365 U.S. 534, 81 S. Ct. 735, 5 L.Ed. 2d 760 (1961)], a new trial is required if the trial judge or the jury, in finding the facts, has been guided by an erroneous standard of law. However, there will be situations in which statements of the trier

> of fact will do no more than create doubt as to whether the correct standard has been applied. In such situations a District Court hearing to determine the constitutional issue will be necessary.

Id. at 315 n.10, 83 S. Ct. at 758 n.10.

The state court in the case before us made no specific findings of historical fact and its general determinations are infected by its erroneous view of the controlling legal standard:

> On due and careful consideration of the evidence before this Court on each of the grounds of the Petitions and the Amendment thereto, separately and severally, it is the opinion of this Court that no ground of the Petitions and the Amended Petitions is well founded. It is further the opinion of this Court that the petitioner was not denied any right afforded him under the Constitution of the United States or the Constitution of the State of Alabama nor under any law thereof; that he voluntarily and intelligently and understandingly entered pleas of guilty in each case with full knowledge of all of his rights, including those he was waiving by entering said pleas;

> that the please were voluntarily, knowingly and intelligently made along with and on the advice of capable, experienced, competent and effective attorneys. It is, therefore, the opinion of this Court that the Petitions and the Amended Petitions and each ground thereof should be denied.[3]

The opinion offers no findings of fact and the state court's use of the "farce or mockery of justice" standard renders their reconstruction impossible. Cf. United States ex rel. Liss v. Mancusi, 427 F.2d 225, 229 (2d Cir. 1970) ("Of course, no reconstruction of the facts could be made if it were not clear that the state trial court had applied correct constitutional standards.")

---

[3]We note that even if the state court had employed the correct constitutional standard, the determination that petitioner had received effective assistance of counsel is not itself a finding of historical fact but a determination of a mixed question of law and fact not entitled to a presumption of correctness under 28 U.S.C. § 2254(d). See Mason v. Balcom, 531 F. 2d 717, 721-22 (5th Cir. 1976).

Accordingly, an evidentiary hearing is required under Townsend. It is not enough for the magistrate to find that the record supports the state judge's ultimate finding. The record presents a sharp conflict in the evidence. Petitioner disputed the testimony of his attorneys in critical respects. Credibility choices were required which demand, as we have often noted, that the fact-finder observe the witness. See, e.g., Louis v. Blackburn, 630 F. 2d 1105, 1110 (5th Cir. 1980). As the Court stated in Townsend:

> Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. An questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given the opportunity to present other testimonial and

> documentary evidence relevant to the disputed issues.

372 U.S. at 322, 83 S. Ct. at 761 (footnote omitted).

We note that the fourth circuit when confronted with facts similar to those in the present case arrived at the same conclusion we reach today. After discussing the applicable law the fourth circuit held: "The Superior Court's silence with respect to disputed, historical facts, coupled with its feliance on the farce and mockery of justice' test for determining the competency of counsel makes it inappropriate for the district court to decide this case solely on the basis of the state records." Fuller v. Luther, 575 F.2d 1098, 1101 (4th Cir. 1978).

[2] We reject petitioner's contentions that the record compels a finding that he was denied the effective assistance of counsel and that his pleas

of guilty were not informed and voluntary. If credited, the evidence detailed in the magistrate's opinion will support a contrary holding.

[3] We consider it unnecessary to deal with petitioner's final contention concerning denial of discovery. The matter is within the discretion of the trial court and not a matter of right. Harris v. Nelson, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969). We have not way of anticipating how the trial court will rule on this request in view of our requirement that an evidentiary hearing be held.

We vacate the district court's judgment denying relief. We retain jurisdiction but remand the case to the district court for an evidentiary hearing to determine whether petitioner received effective assistance of counsel. After its hearing the district court's findings

and conclusions and judgment entered thereon shall be returned to this panel.

VACATED and REMANDED with instructions.

* * *

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

June 23, 1981

GILBERT F. GANUCHEAU
CLERK

TEL 404-221-6187
FTS-242-6187
56 FORSYTH ST., N.W.
ATLANTA, GEORGIA
30303

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 80-7240 - JOHNNY HARRIS -vs- JOSEPH OLIVER, ETC., ET AL.

(District Court No. CA-78-A-0278-S)

The following action has this day been taken in the above case;

( ) AN EXTENSION OF TIME has been granted to and including

( ) for filing appellant's/petitioner's brief.

( ) for filing appellee's/respondent's brief.

( ) for filing reply brief.

( ) for filing petition for rehearing.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct the record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Joint motion as to time for filing briefs granted.

(X) Order enclosed has been entered.

( )

GILBERT F. GANUCHEAU,
Clerk

cc: Ms. Eleanore M. Garber
Mr. W. Clinton Brown
Mr. Joseph G. L. Marston, III

BY: LAURA M. YOUNG
Deputy Clerk

ql

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-7240

JOHNNY HARRIS,

Plaintiff-Appellant,

versus

JOSEPH OLIVER, Warden of the Holman Unit Prision, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 18, 1981, 5 Cir., 198_, ____ F.2d ___).

(June 23, 1981)

Before TJOFLAT, FAY and VANCE, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court jbe polled on rehearing en banc (Rule j35, Federal Rules of Appellant Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of not of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit
Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND
LOCAL RULE 17 FOR
STAY OF THE MANDATE

APPENDIX C

28 UNITED STATES CODE 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas coprus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective pro-

cess or the existence of circumstances rendering such process ineffective to protect the right of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In an proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indi-

cia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right,

failed to appoint counsel to prepresent him in the State Court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State Court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the

record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

APPENDIX D
367 So. 2d 524
Johnny HARRIS

v.

STATE.

6 Div. 819.

Court of Criminal Appeals of Alabama

Oct. 31, 1978.

Petition for Additional Facts Denied and Application for Rehearing Denied Nov. 21, 1978.

Petition was filed for writ of error coram nobis. The Circuit Court, Jefferson County, Joseph J. Jasper, J., denied relief, and petitioner appealed. The Court of Criminal Appeals, Tyson, J., held that: (1) although one attorney had been appointed to represent defendant on rape charges and another to represent him on robbery charges, the attorneys' agreement that one of them would handle investigative work and the other conduct research into matters dealing with trial itself did not constitute ineffective

representation; (2) presumption in a coram nobis hearing is that counsel was adequate and effective as to trial, and (3) one who pleads guilty may not thereafter raise independent claim relative to deprivation of constitutional rights that occurred prior to entry of the plea.

Affirmed.

Writ denied, Ala., 367 So. 2d 534.

1. Criminal Law 1159.3(1)

On appeal from denial of petition for writ of error coram nobis it is not within the province of the Court of Criminal Appeals to pass judgment on the truthfulness or falsity of conflicting evidence.

2. Criminal Law 641.13(2)

Although one counsel had been appointed to defend defendant on robbery charges and another to defend him on rape charges, counsels' agreement that one would handle investigative work while the

other would conduct research into matters dealing with trial itself did not constitute ineffective representation, especially where victim of one robbery was also a rape victim. U.S.C.A. Const. Amend. 6.

3. Criminal Law 641.13(5)

Failure to make pretrial motion did not constitute ineffective representation where such failure was in conformance with local practice of dealing with pretrial motions at trial on voir dire. U.S.C.A. Const. Amend. 6.

4. Criminal Law 641.13(6)

Failure of appointed counsel to subpoena medical records on rape victim did not constitute ineffective representation where defense was alibi and there was no showing that medical report tended to establish an alibi or lend support thereto. U.S.C.A. Const. Amend. 6.

5. Criminal Law 641.13(6)

Failure to subpoena witnesses did not constitute ineffective representation in view of evidence that it was counsel's best judgment that alibi witnesses were certain to be in court on day of trial and, furthermore, subpoenas would necessarily reveal the witnesses' identity to the State. U.S.C.A. Const. Amend. 6.

6. Criminal Law 997.15(2)

Presumption indulged in by the court in a coram nobis hearing challenging effective assistance of counsel is to effect that counsel was adequate and effective at trial. U.S.C.A. Const. Amend. 6.

7. Criminal Law 997.15(2)

Appointed counsel's testimony that scant materials be produced at coram nobis hearing were not all of his work product on petitioner's case and that he was unable to produce missing materials

after diligent search of every place where such material might be found was insufficient to overcome presumption that counsel, charged with ineffective representation, was prepared for trial when he announced ready. U.S.C.A. Const. Amend. 6.

8. Criminal Law 997.15(2)

A petition in a coram nobis proceeding bears a very heavy burden of proof.

9. Courts 97(1)

Holdings of United States Court of Appeals for the Fifth Circuit are regarded as persuasive authority but state courts are not bound to adhear totally thereto.

10. Criminal Law 641.13(1)

Standard in reviewing claim of ineffective representation is whether the proceedings were rendered a farce or mockery of justice. U.S.C.A. Const.

Amend. 6.

11. Criminal Law 997.15(3)

Where convictions were based on guilty pleas, only proper issue on petition for writ of error coram nobis was voluntary and intelligent character of the pleas; hence, medical report on rape victim, files of prosecutor and police, payment vouchers to appointed counsel, alibi testimony and testimony concerning petitioner's alleged hostility toward one counsel was properly excluded.

12. Constitutional Law 268.2(3)

Denial of motion for funds for investigative and hearing purposes and for payment of counsel was not a denial of due process where defendant had assistance of able and competent counsel throughout all of the proceedings, defendant had expert to testify in his behalf and court issued numerous subpoenas and subpoenas duces tecum.

13. Criminal Law 273(1)

A guilty plea represents a break in the chain of events which has preceded it in the criminal process.

14. Criminal Law 273.4(1)

When a person admits in open court that he is in fact guilty of the crime or crimes with which he is charged he may not thereafter raise independent claims relating to deprivation of constitutional rights that occurred prior to entry of the plea and he may only attack the voluntary and intelligent character of the plea by showing that the advice he received from counsel was not within the applicable standard. U.S.C.A. Const. Amend. 6.

15. Criminal Law 273.1(1)

Standard for determining validity of guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action

opened to the defendant.

16. Criminal Law 273.2(1)

If the guilty plea is voluntarily and intelligently made the defendant should not be allowed to later attack it, even though he maintained his innocence, should he select that alternative, knowing the sentence to be less that the maximum.

William H. Allison, Jr., and Eleanore M. Garber of Allison, Soreff & Garber, Louisville, Ky., W. Clinton Brown, Jr. of Crawford, Blacksher, Figures & Brown, H. Diana Hicks, Mobile, Anthoy Amsterdam, Stanford, Cal., Jack Greenberg, James Nabrit, III, David Kendall, Peggy Davis, New York City, for appellant.

William J. Baxley, Atty. Gen., and J. Bernard Brannan, Jr., Mary Jane LeCroy, Larry R. Newman, Asst. Attys.

Gen., for the State.

TYSON, Judge.

The appellant was indicted at the October, 1970, Term of the Jefferson County Grand Jury of four charges of robbery and one charge of rape. When the case was called for trial, on April 5, 1971, the appellant was present in court with his two court-appointed attorneys, the Honorable Milton Garrett and the Honorable Louis Scholl, who each announced, "Ready for Trial." Trial was set for the following day on the rape case, which had been assigned by the court to Attorney Louis Scholl. Immediately after the jury had been qualified for trial, the defense requested, and was granted, additonal time to confer with the appellant. Subsequent to the conference with his attorneys, the appellant executed an Ireland form (Court's Exhibit A, R. pp. 726, 778, 869, 914), i. e., an explanation of

appellant's constitutional rights, in each case. Thereafter, the appellant entered pleas of guilty in each case and was sentenced to five consecutive life sentences. No appeal was taken form these above convictions.

In May, 1973, the trial judge dismissed the appellant's pro se petition for a writ of error coram nobis. While serving his sentences, the appellant, in 1975, was charged with, and convicted of, murder in the first degree under Title 14, Section 319, Code of Alabama 1940. Punishment was fixed by the jury at death by electrocution. This cause was affirmed by this court in Harris v. State, Ala. Cr. App., 352 So. 2d 460 (1977), and affirmed by the Alabama Supreme Court court in Harris v. State, Ala. Cr. App., 352 So. 2d 479, which set the execution date for March 10, 1978.

On February 17, 1978, the trial judge denied the appellant's motion for

stay of execution, which was filed contemporaneously with a petition for writ of error coram nobis in each of the five cases wherein life sentences were given.

On March 7, 1978, in the United States District Court for the Southern District of Alabama, the appellant was granted a stay of execution for a period of sixty days. On March 21, 1978, the appellant, through his volunteer counsel, amended his petition for writ of error coram nobis. A hearing on the appellant's petition was set for March 31, 1978, and sebsequently continued until April 6, 1978. On that date, the appellant was represented in court by his volunteer counsel whose zealous and competent representation in this cause has been exemplary. At the conclusion of the hearing on the petition, the trial judge took the matter under consideration until

April 19, 1978, when he rendered a written decree denying the petition (R. pp. 764, 810, 855, 900, 945). From the denial of his petition for writ of error coram nobis, appellant prosecutes this appeal.

I

Appellant asserts that his right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution was denied him during the course of the handling of the cases which culminated in his receiving five consecutive life sentences on April 6, 1971. Appellant enumerates in brief specific instances of allegedly ineffective assistance of counsel. Discussion herein of the issues raised by the allegations shall be limited to the question of whether the testimony presented at the coram nobis hearing was sufficient, as a

matter of law, to entitle the appellant to a new trial.

The bench notes (Exhibits 2-6) indicate that appellant's preliminary hearing was set for September 11, 1970, on four charges of robbery and one charge of rape (R. p. 65). Attorney John Prince was appointed to represent the appellant at this state of the proceedings. Attorney Prince testified that he made an agreement with the District Attorney to the effect that the District Attorney would open his files to the defense if the defense agreed to waive the preliminary hearing. (R. pp. 105, 106).

[1] Attorney Prince testified that appellant agreed to waive the preliminary hearing (R. p. 106). Appellant testified that he did not agree to waive the preliminary hearing. (R. p. 653). Appellant argues that waiver of the preliminary hearing illustrates the ineffective-

ness of appellant's counsel. Clearly, the conflict in the testimony presented a question of fact. It is not within the province of this Court to pass judgment on the truthfulness or falsity of conflicting evidence. May v. State, Ala. Cr. App., 335 So. 2d 242 (1976); Snipes v. State, 50 Ala. App. 139, 277 So. 2d 413 (1973).

[2] Appellant asserts that his attorneys' failure to conduct adequate pretrial investigation is another instance illustrating his denial of the right to effective assistance of counsel. It appears from examination of Attorney Garrett's file that the bulk of his investigative effort related to the rape charge. The fact that the rape charge was to be tried first probably explains the emphasis that Attorney Garrett placed on that case. The record reveals that Attorney Garrett was appointed to defend

the appellant on two robbery charges. The victim of one of the alleged robberies was also the victim in the rape case that Attorney Scholl was appointed to defend. For this reason, it is difficult to separate Attorney Garrett's investigative work on the robbery charge from his work on the rape charge. The testimony of both Attorney Garrett and Attorney Scholl indicates that they came to an understanding concerning their work on the appellant's cases (R. pp. 505, 220). Accordingly, Attorney Garrett was to handle the investigative work and Attorney Scholl was to conduct research into matters dealing with the trial itself.

Appellant makes much of the assertion that the attorneys' division of labor on the five cases was unauthorized in light of their specific appointment by the judge to individual cases. Implicit

in the argument is the assumption that authorization was required for such an arrangement between the attorneys. The fallacy of the appellant's argument is that, if it was the appellant's attorneys' best judgment that a more effective and adequate defense could be given the appellant by avoiding inefficient, uncoordinated investigation and research, then to require court authorization for such an arrangement would remove a vital part of the flexibility requisite to effective, adequate representation of a defendant at trial, and to an attorney's preparation for trial. Such authorization, if required by court decree, would necessarily entail the inefficient management of an attorney's time, contrary to the client's best interest.

[3] Appellant asserts that another element of his attorneys' ineffective representation of him was their failure

to make any pretrial motions or to enter any special pleas. Appellant presented expert testimony to the effect that, under certain circumstances, pretrial motions could be crucial to the outcome of a criminal case, especially one involving arrest, search and seizure, and preindictment lineups. But none of appellant's experts could be unequivocal when asked whether it was outside the range of competence demanded of attorneys in criminal cases not to file pretrial motions. Furthermore, the testimony of Judge Gibson (R. p. 701) indicates that the practice in the Circuit Court of the Tenth Judicial Circuit at the time of appellant's trial was to deal with pretrial motions at the trial on voir dire with the jury excused from the courtroom. The failure to file pretrial motions would seem, therefore, to be in conformance with the general practice locally rather

than in violation of the attorneys' constitutional duties.

[4] Appellant asserts that the failure of his appointed counsel to subpoena the medical report on the rape victim is further support for his contention that he was denied the right to effective assistance of counsel. The testimony of the appellant and both attorneys indicates that the defense to be used against the rape charge was alibi. It is a fundamental proposition that the defense of alibi does not involve a denial that the offense in question occurred. Rather, the defense asserts that the defendant was not involved with the accurrence of the offense because of his alibi which he seeks to establish through his own and others' testimony. It would seem, therefore, not unreasonable to conclude from the testimony presented that it was the appellant's attorneys' best judgment

that the medical report on the rape victim was not probative of the appellant's innocence since the defense agreed to was alibi, and the medical report did not tend to establish an alibi or lend support thereto. Appellant replies that the medical report might have made the defense of consent a viable option. However, since the appellant himself asserted to his attorneys that he did not commit the offense, there would seem to be a fundamental inconsistency in the pursuit of consent as a defense under these circumstances.

[5] Appellant asserts that failure to subpoena witnesses to appear to testify at appellant's trial is another instance which illustrates that he was denied the right to effective assistance of counsel. This conclusion is not warranted from the testimony presented in that it was the appellant's two attorneys'

best judgment that the appellant's alibi witnesses were certain to be in court on the day of trial, thus rendering a subpoena unnecessary to assure their presence. Also, such subpoenas would necessarily reveal the witnesses' identity to the State. Furthermore, the testimony is in conflict as to whether the witnesses were, in fact, in court on the appointed day, April 6, 1971. Appellant testified that no alibi witnesses were present in court on the day of trial. (R. p. 665). Attorneys Garrett and Scholl testified that alibi witnesses were present (R. pp. 584, 249). As hereinabove noted, it is not within the province of this Court to resolve such conflicts in the evidence. May v. State, supra. The trial court's findings are supported by the evidence.

[6,7] The record reveals that Attorney Scholl's file on appellant's

cases contained only seven pages of material. Furthermore, it is apparent from his testimony that Attorney Scholl's memory of important facets of his representation of appellant was extremely vague. Attorney Scholl testified that the scant materials that he produced at the coram nobis hearing in response to appellant's subpoena duces tecum were not all of his work product on appellant's cases (R. p. 301). However, he was unable to produce the missing materials after diligent search of every place where such might be found.

Appellant argues that Attorney Scholl's inability to document or to recall independently specific events in the representation of appellant seven years prior to the coram nobis hearing should lead to the conclusion that appellant was not effectively represented. It is a matter of record that, on April 6, 1971,

in court, Attorney Scholl announced that he was ready for trial.

The presumption indulged by the court in a coram nobis hearing is to the effect that counsel was adequate and effective at trial. Willis v. State, 42 Ala. App. 85, 152 So. 2d 883 (1963).

The testimony presented does not fully, clearly, and satisfactorily overcome the presumption that Attorney Scholl was prepared for trial when he announced he was ready for trial. It is not unreasonable to conclude from the testimony that Attorney Scholl was prepared for trial and later, during the seven year interval, lost or misplaced his work product. Time alone will dim memories. This Court's determination with respect to this particular allegation speaks solely to the weight of the testimony presented at the coram nobis hearing and is not intended to be a

statement relating in any manner to the standards of conduct demanded of attorneys in good standing with the State Bar Association of the State of Alabama embodied in the Code of Professional Responsibility, 293 Ala. XXVII.

Appellant testified that at the trial, on April 6, 1971, during a pause in the jury selection process his attorneys informed him that no witnesses were subpoenaed, that they were not prepared for trial and that he should change his plea in order to avoid the possibility of receiving the death penalty (R. p. 667).

Appellant argues that his attorneys' inadequate investigation and preparation so narrowed his alternatives that his plea of guilty was, in effect, coerced. The testimony of Attorneys Garrett and Scholl directly contradicts appellant's account of the decision to plead guilty.

According to Attorney Scholl, when he asked appellant why he wanted to change his plea, appellant said (R. p. 288):

> ". . .[T]hey have got me cold on three cases and I don't want to go through five trials."

Resolution of the conflict in the testimony, as hereinabove stated, is not the province of this Court. May v. State, supra.

[8] The foregoing discussion of the various specific allegations in appellant's petition restated on this appeal is intended to show that appellant has failed to carry the very heavy burden of proof demanded in a petition for wirt of error coram nobis.

> "The petitioner has the burden of fully, clearly, and satisfactorily proving the allegations in his or her petition. The trial court's judgment is presumed correct as is the voluntariness of a guilty plea, the adequacy of counsel, the truth of testimony, and the legality of a search and seizure used in obtaining evidence.

> The degree of proof required to rebut these presumptions and to prove the allegations of the petition is the highest used in any civil action; it is 'highly exacting as a proof of facts "and always means more than reasonably satisfying."'" [Footnotes omitted]
>
> Comment, Postconviction Remedies in Alabama, 29 Ala.L.Rev. 617, 633 (1978).

Therefore, the allegation that appellant was denied the effective assistance of counsel must be rejected as not having been established and sustained by the proof presented. We quote from the judgment of the trial court (R. pp. 771-773, 817-819, 862-864, 907-909, 952-954):

> "Each accused is entitled not only to assistance of counsel, but to effective assistance of counsel. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). As stated in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the State must appoint counsel for an accused felon if he cannot afford to hire his own attorney.

"The same standards of representation apply whether counsel is retained or appointed. The standard of effective counsel does not guarantee an accused an attorney with whose advise he can agree nor can it be equated with a not guilty verdict. When the question arises whether an accused should plead guilty, waive a trial by jury or take the witness stand, defense counsel must be governed by and abide by the wishes of his client. Taylor v. State, 291 Ala. 756, 287 So. 2d 901

"Effective assistance does not mean that counsel is not free from error. What may later seem to be error may have been a trial tactic at the time. As to what pretrial motions should be filed and other strategic jand tactical decisions should be within the province of the lawyer after consultation with the client. Quoting Chief Justice Burger, who wrote while a Circuit Judge for the United States Court of Appeals, District of Columbia Circuit, 'We reject the notion that it is defense counsel's duty to "make every motion in the book" in the hope that one may succeed.' There is a heavy burden on petitioner to establish his claim of ineffective assistance of counsel. Harried v. U.S., 128 U.S. App. D.C. 330, 389 F. 2d 281.

"In Williams v. Beto, 354 F. 2d 698, 704 (5th Cir. 1965), the Fifth Circuit Court of Appeals said:

> "'It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory or without adequate opportunity for conference and preparation.'

"See also United States v. Long, 419 F. 2d 91 (5th Cir.). The petitioner in these five cases failed to advise the Trial Court as to any disagreement between said petitioner and his court appointed attorneys. "This Court holds that the petitioner has failed to cary the heavy burden to show incompetent or ineffective counsel. This Court further finds that the court appointed attorneys, Honorable Louis Scholl and Honorable Milton Garrett, were and are competent and effective defense attorneys to represent indigents in any jurisdiction. Both of these attorneys have handled numerous criminal matters competently and effectively in this Court

and the five cases in question here are no exception."

II

[9,10] Appellant asserts that the court below used the wrong standards in reviewing the conduct of appellant's attorneys at trial. Appellant relies on Herring v. Estelle, 491 F. 2d 125 (5th Cir. 1974), for the proposition that the determination as to whether the proceedings were rendered a farce of mockery of justice (the standard used by the court below) "is but one criterion for determining if an accused has received the constitutionally required minimum representation." Herring v. Estelle, supra, at 128.

While this Court often looks to the United States Court of Appeals for the Fifth Circuit for guidance, the holdings of that Court are regarded as persuasive authority, and we are not bound to adhere

totally to same.

This Court has held that the duty of counsel, retained or appointed, is to prevent the trial from being or appearing to be a farce or mockery of justice. Gore v. State, 45 Ala.App. 146, 227 So. 2d 432, cert. denied, 284 Ala. 729, 227 So. 2d 435 (1969), cert. denied, 397 U.S. 966, 90 S.Ct. 1002, 25 L. Ed. 2d 258 (1970).

Therefore, we determine that there is no merit to the contention that the court below used the wrong standards in judging appellant's attorneys' representation. See also, Walker v. State, Ala. Cr. App., 355 So. 2d 755 (1978); Hillyer v. State, Ala. Cr. App., 351 So. 2d 646, cert. denied, Ala., 351 So. 2d 134 (1977); Taylor v. State, 291 Ala. 756, 287 So. 2d 901 (1973), cert. denied, 416 U.S. 945, 94 S. Ct. 1955, 40 L. Ed. 2d 298 (1974); Mills v. State, 275

Ala. 217, 153 So. 2d 650 (1963).

III

[11] Appellant argues that the lower court improperly restricted the scope of the coram nobis hearing. The result of the court's ruling was the exclusion of the following evidence:

(1) The medical report on the rape victim;

(2) The files of the district attorney and the police;

(3) The payment vouchers from the State Comptroller's Office to Attorneys Garrett and Scholl for cases other than appellant's case;

(4) Alibi testimony;

(5) Testimony concerning appellant's alleged hostility toward Attorney Scholl.

In approving the lower court's ruling on the above matters, we quote from the relevant portion of the record

(R. pp. 38-40):

"THE COURT: The Court is well aware of the situation before it and the surrounding circumstances involving other matters pertaining to this petitioner. However, this Court is still bound by the law and I intend to follow the law in the matter. And as a matter of law and I will quote from one of the cases that accurately spells out the office of a petition for writ of error coram nobis, and it is the case of Groce v. State. The office of the writ of error coram nobis under Alabama law is to bring to the attention of the Court for correction of error of fact; one not appearing on the face of the record, unknown to the Court or the party affected and which, if known in time, would have prevented the judgment challenged and serves as a motion for a new trial on the ground of newly discovered evidence. The writ is not intended to relieve a party from his own negligence and cannot serve as a substitute for an appeal nor to enable a defendant to question the merits of the case for which he stands convicted. With that in mind. . ..

"MR. ALLISON: What's the cite on that?

"THE COURT: That's 267 Southern 2nd, 499.

"With that in mind and the case of Tollett vs. Henderson and the case of McMann vs. Richardson, the issues before us are five guilty pleas. Those five guilty pleas are a break in the chain of criminal process from the time of the offense occurring, the arrest, up to the time of trial. There must be a plea of guilty before we can proceed on this basis and I am referring only to a coram nobis that pplies to pleas of guilty and not to where there had been trials. Therefore, in view of the cases, United States Supreme Court cases too, that you cannot raise independent claims to denial of constitutional rights occurred prior to the plea. You can only attack the voluntary and intelligent character of the guilty plea, such as the advice of counsel and competent counsel; third, you can refer to the judgment of the defendant and counsel to enter a plea and evaluate the State's case. You must consider the effective assistance of competent counsel and as was stated in some of the Supreme Court cases, that the defendant at times assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts and I am referring primarily to the McMann vs. Richardson case. So to reiterate, the issues before us are the petition for writ of error coram nobis is to correct

> an error of fact not appearing on the face of the record, unknown to the Court, unknown to the defendant at the time of the entry of the plea of guilty and had that been known, it would have changed the judgment and it amounts to a motion for a new trial on newly discovered evidence unless you can show ineffective or incompetent counsel. So with the issues as specified by this Court, this Court feels we are in a position to proceed at this time."

Accordingly, we adopt the opinion of the trial court quoted hereinafter with respect to its ruling on the scope of the coram nobis hearing in this cause (R. pp. 773-774, 819-820, 864-865, 909-910, 954-955). See, Tyson, Whither: On Habeas, 24 Ala. Lawyer 271 (1963), cited in Goodwin v. Holman, 361 F. 2d 403, 404 (5th Cir. 1966); Pate v. Holman, 341 F. 2d 764, 768 (5th Cir. 1965); Williams v. Alabama, 341 F. 2d 777, 781 (5th Cir. 1965). See generally, Burns v. Alabama, 377 F. 2d 233 (5th Cir. 1967); Bland v. Alabama, 356 F. 2d 8 (5th Cir., 1966);

Davis v. Holman, 354 F. 2d 774 (5th Cir. 1965)

> "Finally, we should address the issue of the purpose of the Writ of Error Coram Nobis in the criminal justice system. This Court has found no better words regarding this issue than those of the Supreme Court of Alabama and reiterated by the Alabama Court of Criminal Appeals and the United States District Court for the Southern District of Alabama:
>
> > "'The office of the "writ of error coram nobis," under Alabama Law, is to bring to the attention of the Court for correction of an error of fact, one not appearing on the face of the record, unknown to the Court or party affected, and which, if known in time, would have prevented the judgment challenged and serves as a motion for a new trial on the ground of newly discovered evidence. The writ is not intended to relieve a party from his own negligence, and cannot serve as a substitute for an appeal, nor to enable a defendant to question the merits of the case for which he stands convicted.' Tillis v. State, 349 So. 2d 95 (1977); Groce v.

State, 48 Ala. App. 709, 267 So. 2d 499; Smith v. Hickson [Hixon], 149 F. Supp. 283; Smith v. State, 245 Ala. 161 16 So. 2d 315."

IV

[12-16] With respect to the remaining issues raised on this appeal, we adopt the opinion of the lower court as the opinion of this Court. (R. pp. 776-774, 812-820, 857-865, 902-910, 947-955):

"The petitioner filed Motions for Appointment of Counsel and Motions for Funds for Investigative and Hearing Purposes and for Payment of Counsel in each of the five cases. The petitioner was represented in all proceedings by volunteer attorneys who appeared and adequately and competently represented him. These attorneys have represented the petitioner in the Circuit Courts, Appellate Courts of Alabama and Federal Courts as is shown in Paragraph 4 of the Motions for Funds, etc. This Court finds that in all proceedings to date, the attorneys, Honorable William A. Allison, Honorable Eleanore Garber, Honorable W. Clinton

Brown and Honorable H. Diana Hicks, have been well prepared and have adequatley and competently represented the petitioner. Therefore, there was no injury or denial of due process nor denial of right to counsel to the petitioner when this Court denied the Motions for Appointment of Counsel for a Coram Nobis hearing. Ford v. U.S. (5th Cir.), 363 F. 2d 437 (1966); Juelich v. U.S., 342 F. 2d 29. The denial of the Motions for Funds for Investigative and Hearing Purposes and for Payment of Counsel was not a denial of due process. While some provisions are made for this in the Federal system, it is not the present situation in this state. Tillis v. State, 292 Ala. 521, 296 So. 2d 892; Wheeler v. State, 47 Ala. App. 457, 256 So. 2d 197; and more recently in Harris v. State, 352 So. 2d 460, the Alabama Court of Criminal Appeals stated:

> "'Appellant was not denied due process where the State did not provide funds for the employment of a special investigator to aid him in procuring witnesses in his defense.' Citing Tillis v. State, supra."

"That the petitioner had the assistance of able and competent counsel through all of

these proceedings; that these volunteer attorneys protected all of the petitioner's rights through all of the proceedings; that the petitioner did in fact have experts to testify in his behalf during the proceedings; and that this Court, at the request of the petitioner, issued numerous subpoenas and Subpoenas Duces Tecum further leads this Court to find, and it is so held, that none of the petitioner's rights have been violated by the denial of the Motions for Funds.

"As noted above, the petitioner entered Pleas of Guilty on April 6, 1971, to one case of Rape and four cases of Robbery. These pleas were entered prior to the decision in Furman v. Georgia, supra.

"The petitioner by Motion and in his Petitions for Writ of Error Coram Nobis and the Amendment thereto attempted to present matters affecting the criminal processes prior to the Pleas of Guilty. As shown by Brady v. U.S., 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747, a defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty that the sentence that could be imposed after a trial and a verdict of guilty. In the instant cases, the petitioner entered guilty pleas and was sentenced

to five consectutive life sentences as opposed to the maximum punishment of death in each case.

"A guilty plea represents a break in the chain of events which has preceded it in the cirminal process. When a person admits in Open Court that he is in fact guilty of the crime or crimes with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763:

> "'In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of defendant's confession.'

"As shown by the Bench notes in each of the five cases, the defendant was asked by the Court if he had anything to say why the Court should not impose the sentence and he replied in

each instance, 'No Sir.' The petitioner never complained of the character of the pleas of guilty prior to Furman v. Georgia, supra [408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346]. It was only after the Furman decision that the petitioner, in 1973, filed a Pro Se Petition for Writ of Error Coram Nobis and at that time he did not complain of the advice of his court appointed attorneys. The only allegation made in his Pro Se Petition was, 'Petitioner contends that he was represented in Court, by a court appointed attorney, who seemingly didn't have petitioner's interest at heart.'

"Quoting again from McMann, supra, 'What is at stake in this phase of the case is not the ingegrity of the state convictions obtained on guilty pleas, but whether, years later, defendant must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof.'

"Once the defendant chooses to by-pass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby

obtained. Lefkowitz v. Newsome, 420 U.S. 283, 95 S. Ct. 886, 43 L. Ed. 2d 196; McMann v. Richardson, supra. In all criminal prosecutions there must be a finality of litigation and how more final that a valid plea of guilty where a defendant in open court with competene counsel solemnly admits to having committed the crime for which he stands charged?

"The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action opened to the defendant. North Carolina v. Henry Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). If the guilty pleas were voluntarily and intelligently made, the defendant should not be allowed to later attack the plea, even though he maintained his innocence, should he select that alternative, knowing the sentence to be less than the maximum. North Carolina v. Alford, supra.

"In Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), the Supreme Court of the United States held that the record must disclose that the defendant voluntarily and intelligently and understandingly entered the plea of

guilty. As in the cases before this Court, the Record, Bench notes and "Court's Exhibit A,' also known as the 'Ireland Form,' were sufficient record to show that the petitioner, at the time of the pleas, knowingly, intelligently and understandingly entered such pleas. Twyman v. State, 293 Ala. 75, 300 So. 2d 124; Ireland v. State, 47 Ala. App. 65, 250 So. 2d 602; White v. State, 54 Ala. App. 27, 304 So. 2d 268.

"As to the Preliminary Hearing, the petitioner cannot raise independent claims to denial of constitutional rights wheich arose prior to the guilty pleas. Lefkowitz v. Newsome, supra; Tollett v. Henderson, 411 U.S. 258, 93 S. Ct. 1602 36 L. Ed. 2d 235.

". . . ..

"On due and careful consideration of the evidence before this Court on each of the grounds of the Petitions and the Amendment thereto, separately and severally, it is the opinion of this Court that no ground of the Petitions and the Amended Petitions is well founded. It is further the opinion of this Court that the petitioner was not denied any right afforded him under the Constitution of the United States or the Constitution of the State of Alabama nor under

any law thereof; that he voluntarily and intelligently and understandingly entered pleas of guilty in each case with full knowledge of all of his rights, including those he was waiving by entering said pleas; that the pleas were voluntarily, knowingly and intelligently made along with and on the advice of capable, experienced, competent and effective attorneys. It is, therefore, the opinion of this Court that the Petitions and the Amended Petitions and each ground thereof should be denied."

After careful consideration of the Five Volume Record involved in this appeal, we are of the opinion that this case is due to be and is hereby

AFFIRMED.

All the Judges concur.

* * *

367 So. 2d 534

Ex parte Johnny HARRIS.

78-149.

Supreme Court of Alabama.

Feb. 23, 1979.

Certiorari to the Court of Criminal Appeals, 367 So. 2d 524.

BLOODWORTH, Justice.

WRIT DENIED.

TORBERT, C.J., and FAULKNER, ALMON and EMBRY, JJ., concur.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Joseph Oliver, Warden, Petitioner, do hereby certify that on this ___ day of August, 1981, I did serve the requisite number of copies of the foregoing on the Attorneys for Johnny Harris, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

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Opposition

No. 81-313

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH OLIVER, Warden,
Holman Prison, Alabama,

Petitioner,

-against-

JOHNNY HARRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, applying Townsend v. Sain, 372 U.S. 293 (1963), correctly ordered the District Court to hold an evidentiary hearing on respondent's claim that his trial counsel rendered ineffective assistance in this case in which the state courts had employed an erroneous standard of law and had failed to make specific findings of primary or historical facts in resolving respondent's claim?

2. Whether the Court of Appeals has the power to remand this action to the Alabama state courts with instructions to reconsider respondent's constitutional claim under the Fifth Circuit's standard for judging the effectiveness of trial counsel, a standard different from that normally employed by the Alabama courts?

3. Whether respondent is forever foreclosed from collateral attack of his guilty pleas on the ground that he received ineffective assistance from his trial counsel, having once signed guilty plea forms in open court?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Reasons for Denying the Writ	7
I. THE COURT OF APPEALS APPROPRIATELY REMANDED THIS CASE FOR AN EVIDENTIARY HEARING IN COMPLIANCE WITH THE REQUIREMENTS OF TOWNSEND V. SAIN AND 28 U.S.C. §2254(d)	7
II. THE COURT OF APPEALS HAS NO AUTHORITY TO REMAND THIS CASE TO THE ALABAMA STATE COURTS, AS PETITIONER SUGGESTS, DIRECTING THOSE STATE COURTS TO RECONSIDER RESPONDENT'S CLAIMS UNDER A LEGAL STANDARD DIFFERENT FROM THAT NORMALLY EMPLOYED BY THE STATE COURTS	10
III. RESPONDENT HAS A CLEAR AND WELL-ESTABLISHED RIGHT TO CHALLENGE COLLATERALLY HIS GUILTY PLEAS BASED ON HIS CONTENTION THAT THE PLEAS WERE INVOLUNTARY BECAUSE HIS TRIAL COUNSEL WERE INEFFECTIVE	11
Conclusion	11

Appendix A: Decreee of the Circuit Court of Jefferson County filed April 19, 1978

TABLE OF CASES

	Page
Blackledge v. Allison, 431 U.S. 63 (1977)	11
Cuyler v. Sullivan, 446 U.S. 335 (1980)	8
Harris v. Oliver, 645 F.2d 327 (5th Cir. 1981)	8
Harris v. State, No. 6699, Circuit Court of Baldwin County, Alabama	5
LaVallee v. Delle Rose, 410 U.S. 690 (1973)	9
MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960)	10
McMann v. Richardson, 397 U.S. 759 (1970)	11
Sumner v. Mata, __U.S.__, 66 L.Ed.2d 722 (1981)	9
Townsend v. Sain, 372 U.S. 293 (1960)	i, 7,8, 11
Statutes	
28 U.S.C. §2254(d)	7,10

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Johnny Harris respectfully requests the Court to deny the petition for a writ of certiorari filed on August 14, 1981, by petitioner Joseph Oliver, seeking review of the Fifth Circuit's judgment in this case.

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are found in Petitioner's Appendices as Appendices B and A, respectively. The opinion of the Circuit Court of Jefferson County, which is unreported, appears in Respondent's Appendix as Appendix A.

JURISDICTION

Respondent accepts the jurisdictional assertions set forth by petitioner. The petition for a writ of certiorari was received by counsel of record in Louisville, Kentucky on August 17, 1981. Pursuant to Rule 22.1 of the Rules of the Court, this brief in opposition is being filed within 30 days from receipt of the petition.

STATEMENT OF THE CASE

Significant omissions and misstatements in the petition for certiorari concerning both the facts surrounding respondent's conviction and the proceedings in the state and federal courts require the following summary of relevant facts.

The Background of Respondent's Conviction

In March, 1970, Johnny Harris and his family became the first Black family to move to a previously all-white neighborhood in Birmingham, Alabama (R. 670A). Neighborhood "incidents" soon began to occur, including the harassment by the Ku Klux Klan of a white couple who befriended the Harris family. A petition campaign was started to induce the Harris family to move away from the neighborhood (R. 187). Shortly thereafter, in August, 1970, respondent Harris was arrested without a warrant. He was charged with five capital offenses: four robberies, in the amounts, respectively, of $11.00, $67.00, $90.00 and $205.00; and a rape of a white woman (R. 35-36). Respondent maintains that the neighborhood hostility resulted in his arrest.

There is no dispute but that Harris asserted his innocence to police officers the evening of his arrest and gave them an exculpatory statement. He similarly asserted his innocence to the attorneys appointed to represent him. According to one of his trial attorneys, respondent provided him with the names of defense witnesses and with alibi information regarding his whereabouts on the night of three of his alleged offenses during the first attorney/client interview. Harris plead not guilty at his arraignment on January 29, 1971, nearly six months after his arrest, and he declined plea offers by the State in August, 1970 and in February, 1971, consistently indicating his desire for trial on all charges. Respondent Harris appeared with

his attorneys on April 5, 1971, the day before trial when the jury cards were drawn (R. 77). There was no evidence of any discussion of a possible plea on that day before trial.

The Circumstances Surrounding Respondent's Conviction

The next morning, April 6, 1971, respondent Harris pleaded guilty to the charges against him and was sentenced to five life sentences. Respondent Harris has maintained throughout his state and federal postconviction proceedings that his plea proceeded directly from the ineffective representation afforded him by his trial counsel. Harris contends that his attorneys conducted an utterly inadequate investigation, failed to prepare for trial, and as he discovered on April 6, 1971, were unready to mount even a minimal defense on his behalf. It is uncontroverted, for example, that respondent's attorneys, prior to trial, had filed no motions to suppress any evidence in connection with respondent's warrantless arrest, the subsequent warrantless search of Harris' home, or the highly questionable lineup procedures, even though at least one of the attorneys acknowledged that he was admittedly on notice of each of these possibly impermissible procedures (R. 500A).

It has further been established without conflict that Harris' attorneys never investigated the medical reports on the alleged rape victim, although Harris' present counsel offered to prove in state postconviction proceedings that the reports raised serious questions as to whether a forcible rape had even occurred.

The attorney appointed to represent Harris on three of his capital charges, including the rape (R. 191A), who was chief trial counsel for all the trials (R. 224), never once consulted with respondent Harris at the jail where he was continuously incarcerated from the time the attorney was first appointed to the case until trial (R. 169-173, R. 214, R. 506-507, R. 655).

The entire contents of the attorney's file consisted of a four-page jury venire, copies of the three indictments on which he had been appointed, and a letter of appointment from the circuit judge (R. 184A, R. 191, Ex. R). The extent of the investigative efforts of respondent's other attorney were never fully clarified. His testimony during state postconviction proceedings concerning his investigation contained serious internal contradictions.

Respondent testified that when he was taken to Court for trial on April 6, 1971, nearly eight months after his arrest, one of his attorneys told him, while seated at the defense counsel table:

> " . . . [H]e didn't see how he was going to win the case when the Court was going to take the white woman's word over mine because I was Black and that he didn't have no intention of bucking the system. Then he advised me to go ahead and take the D.A.'s offer because if I didn't, I would otherwise get the chair." (R. 687).

Following the qualification of the jury, respondent Harris stated that the other attorney told him that

> "[h]e did not have no alibi witnesses subpoenaed; that he really wasn't prepared to go to Court and that he did not really think I was going to fight this all the way and that his best advice to me was that I change my plea . . . ." (R. 688-689).

Respondent contends that, aware that none of the witnesses crucial to his acquittal were in court and that his attorneys were unprepared to try his case, he reluctantly changed his pleas to guilty to avoid a near-certain death sentence and was immediately sentenced to five consecutive life sentences. There was no transcript taken of the guilty plea/sentencing proceeding (R. 80).

Respondent's Subsequent Death Sentence

In 1974, while Harris was serving his sentences, a violent altercation occurred between prison inmates and guards at Holman Prison, resulting in the death of a Black prisoner and a white guard. Although no evidence suggested that Harris had been personally responsible for the guard's death, he was indicted for the death of the guard. The state sought and obtained a death sentence against respondent Harris before an all-white jury. On June 29, 1981, Harris was granted a new trial in state coram nobis proceedings on the ground that the State of Alabama had withheld from Harris and his attorneys "fundamentally impeaching evidence" against a principal prosecuting witness at Harris' trial (Harris v. State, No. 6699, Circuit Court of Baldwin County, Alabama; judgment filed July 1, 1981).

Respondent's Collateral Attack on His Life Sentences

On February 17, 1978, respondent Harris filed petitions for writs of error coram nobis in the Circuit Court of Jefferson County claiming numerous constitutional infirmities in his convictions and life sentences. A hearing was held on respondent's claims, including his allegations that the ineffectiveness of his trial counsel rendered his pleas involuntary. The implications of petitioner to the contrary notwithstanding, (see, e.g., Petition for Certiorari, at 7), the Circuit Court did not hold a full hearing, but instead failed to admit significant items of evidence, excluding, over respondent's objection, facts crucial to respondent's claims. For example, the Circuit Court quashed respondent's subpoenas for the medical reports of the alleged rape victim and for relevant police and prosecutorial files. The Circuit Court also refused to allow respondent to cross-examine his trial attorneys on possible racial prejudice against their client, despite remarks from one of the attorneys on the stand that he "didn't take any crap off Harris," and that

"[w]hen he was hostile to me, I was hostile back."

On April 19, 1978, the Circuit Court entered a decree (A. 1-12) denying respondent's petitions and rejected his ineffective assistance claim after employing a "farce or mockery of justice" standard to determine that Harris received effective assistance of counsel (A. 8-9).

As the Court of Appeals correctly observed, the state court made no specific findings of historical fact in its opinion. The only "findings" or comments in the rather opaque decree regarding the competency and effectiveness of respondent's attorneys were the following:

> "This Court further finds that the Court Appointed attorneys Honorable Louis Scholl and Honorable Milton Garrett were and are competent and effective defense attorneys to represent indigents in any jurisdiction. Both of these attorneys have handled numerous criminal matters competently and effectively in this court and the five cases in question here are no exception." (A. 10).
>
> * * *
>
> "It is further the opinion of this Court that the petitioner was not denied any right afforded him under the Constitution of the United States or the Constitution of the State of Alabama nor under any law thereof; that he voluntarily and intelligently entered pleas of guilty in each case with full knowledge of all of his rights, including those he was waiving by entering said pleas; that the pleas were voluntarily, knowingly made and on the advice of capable, experienced, competent and effective attorneys." (A. 11).

Despite the State's calculated insistence that the ineffective assistance issue is solely one requiring a credibility choice between respondent Harris and his trial attorneys (see, e.g., Petition for Certiorari, 7, 17, 20), it is clear from the state court record that numerous facts bearing on the issue of trial counsel's competence were beyond dispute, including the failure of defense counsel to file any pretrial motions on suppression issues brought to their attention, the lack of any investigation of the alleged rape victim's medical reports, and the failure of the attorneys to subpoena any defense witnesses to trial.

There were no Circuit Court findings concerning these issues, or any of the major disputed issues, some of which did not necessarily require resolution of credibility. For example, we do not know whether the Circuit Court found as a matter of fact that trial counsel consulted with respondent at the jail or whether it concluded as a matter of law, under the "farce and mockery" standard, that it was not necessary for counsel to have done so. We do not know whether the Circuit Court found Harris' defense witnesses gave statements with serious discrepancies, or whether the differences in the accounts were deemed minor. We do not know whether other defenses were found to have been explored and rejected, or whether the Circuit Court held as a matter of law that other defenses need not have been explored. Since none of these questions were ever expressly addressed by the Circuit Court, it is not clear how they were resolved.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPROPRIATELY REMANDED THIS CASE FOR AN EVIDENTIARY HEARING IN COMPLIANCE WITH THE REQUIREMENTS OF TOWNSEND V. SAIN AND 28 U.S.C. §2254(d).

This is a classic, textbook example of a case requiring an evidentiary hearing under Townsend v. Sain. The Fifth Circuit followed the clear guidance of this Court, and its judgment warrants no review. Respondent's entitlement to an evidentiary hearing is not even a matter of discretion. This Court has clearly held that

> "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.
>
> * * *
>
> There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by a defendant." (Townsend v. Sain, supra, 372 U.S. at 312-14.)

"The Townsend opinion, the precursor of [28 U.S.C.] §2254(d), noted that the phrase 'issues of fact' refers to what are termed basic, primary or historical facts; facts in the sense of a recital of external events and the credibility of their narrators . . . ." Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980). The Circuit Court here not only failed to set forth any credibility determinations amidst much conflicting testimony, it failed to make a single finding as to what either attorney did or did not do in their defense of respondent Harris. The decision is opaque, revealing no specifics whatsoever. Thus the principle that if "the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia," Townsend v. Sain, supra, 372 U.S. at 314 is simply inapplicable to this case. As the Fifth Circuit observed, under Townsend:

> "Reconstruction [of implied findings] is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances, the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts." 372 U.S. at 314, cited in Harris v. Oliver (A. 50).

As noted,in its decree denying the coram nobis petitions, the Circuit Court used the "farce and mockery of justice" standard, one no longer recognized in the Fifth Circuit. See Harris v. Oliver, supra (A. 46-47). Since the Circuit Court made no specific factual findings, an evidentiary hearing was compelled under Townsend.

Petitioner has cited this Court's decisions in La Vallee vs. Delle Rose, 410 U.S. 690 (1973) and Sumner v. Mata, __U.S. __, 66 L. Ed.2d 722 (1981) for the proposition that state court findings of fact, whether express or implied, are due a presumption of correctness under 28 U.S.C. §2254(d). The principle established by those cases, however, is not at issue in this case. In LaVallee, it was apparent that the state court had used the correct standard. In Sumner, the Court of Appeals for the Ninth Circuit employed the same standard used by the California state courts. In both cases, therefore, §2254(d) presumptions were relevant. In this case, by contrast, no presumption of correctness can be given to state findings since there were no express findings, and because of the use of different legal standards, no findings can be implied. The State of Alabama has attempted to fashion a Sumner issue where none exists.

In sum, petitioner could not hope to obtain review if it had accurately represented the complexity of the facts still unresolved. Instead it has oversimplified its description of the case, reducing it to a matter of credibility: one must believe respondent, or one must believe his trial attorneys. In reality, as respondent has shown, the constitutional claim turns on far more than credibility determinations. Moreover, even the credibility determination presents a more difficult question than petitioner implies. Under the circumstances, no grant of certiorari is warranted.

II. THE COURT OF APPEALS HAS NO AUTHORITY TO REMAND THIS CASE TO THE ALABAMA STATE COURTS, AS PETITIONER SUGGESTS, DIRECTING THOSE STATE COURTS TO RECONSIDER RESPONDENT'S CLAIMS UNDER A LEGAL STANDARD DIFFERENT FROM THAT NORMALLY EMPLOYED BY THE STATE COURTS.

Petitioner has understandably designated its suggestion that the District Court should send this action back to the state court for so-called credibility findings, three years after that court issued its decree, as a "novel question". The state's proposal is contemplated neither by 28 U.S.C. §2254 nor by prior holdings of this Court. The federal courts have no power to remand a case to a state court and order that court to reconsider a claim under a legal standard not authorized by state law. Moreover, since the Fifth Circuit first articulated the "reasonably effective assistance" standard for judging effectiveness of counsel in MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), in 1960, this standard comes as no surprise to the state courts of Alabama. Indeed, in its opinion affirming the use of the farce and mockery standard in respondent's case, the Alabama Court of Criminal Appeals specifically acknowledged the difference in standards and stated that it did not consider itself bound to adhere to the Fifth Circuit standard (A. 94-95). Considerations of comity simply do not extend to the lengths petitioner's unprecedented suggestion for a remand implies.

III. RESPONDENT HAS A CLEAR AND WELL-ESTABLISHED RIGHT TO CHALLENGE COLLATERALLY HIS GUILTY PLEAS BASED ON HIS CONTENTION THAT THE PLEAS WERE INVOLUNTARY BECAUSE HIS TRIAL COUNSEL WERE INEFFECTIVE.

Petitioner's contention that respondent cannot collaterally attack his pleas of guilty on any grounds once he has executed the guilty plea forms in open court is directly refuted by numerous decisions of this Court, e.g., McMann v. Richardson, supra; Tollett v. Henderson, supra; Blackledge v. Allison, 431 U.S. 63 (1977), in which the Court has repeatedly held that a defendant may be allowed to attack his pleas if they were made without the advice and assistance of competent counsel. Petitioner's suggestion, which would foreclose any relief once a guilty plea had been entered, erroneously assumes that defendants are invariably able to determine, at the moment of judgment, whether their attorneys have advised them competently and effectively. Certiorari should be denied on this issue.

CONCLUSION.

Respondent respectfully submits that the Court of Appeals correctly remanded this case for an evidentiary hearing in compliance with controlling decisions of the Court and federal statutes. No issue raised by petitioner merits review and certiorari should therefore be denied.

Dated: September 16, 1981

Respectfully submitted,

/s/ William H. Allison

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ATTORNEYS FOR RESPONDENT

RESPONDENT'S APPENDIX A

Decree of the Circuit Court of Jefferson County
filed April 19, 1978

By _____ DEPUTY CLERK

EX PARTE	)	CASE NOS. 21835
JOHNNY HARRIS,	)	21836
Petitioner	)	21837
V.	)	21838
STATE OF ALABAMA,	)	21839
Respondent	)	

D E C R E E

This cause having been heard on the Petition for Writ of Error Coram Nobis filed on behalf of the petitioner through his volunteer counsel and motions filed therewith and subsequent to the filing of the petition, this Court makes the following findings of fact and law and enters the following Decree.

The petitioner was indicted by the Grand Jury of Jefferson County, Alabama, during the October Session 1970, on four charges of Robbery (Case Numbers 21835, 21837, 21838 and 21839) and one charge of Rape (Case number 21836). Since these charges arose prior to the decision of the United States Supreme Court in Furman v. Georgia, 408. U. S. 238; 33 L. Ed. 2d 346; 92 S. Ct. 2726, petitioner faced the maximum penalty of death in each case.

On November 24, 1970, Honorable Louis Scholl and Honorable Milton Garrett, two attorneys practicing law in the City of Birmingham, Jefferson County, Alabama, were appointed to represent the petitioner in the aforementioned cases. Mr. Scholl was appointed in Case numbers 21835, 21836 and 21837. Mr. Garrett was appointed to represent the petitioner in Case numbers 21838 and 21839. On January 29, 1971, the petitioner was arraigned with his respective

attorneys in each of the five cases (See Trial Sheets in evidence).

On April 5, 1971, each case was marked, "Ready for Trial," and Case number 21836 was assigned to this Court for trial on the charge of Rape. The jury cards were pulled and venire sheets marked and said cause was held to April 6, 1971, for trial. On said April 6, 1971, the prospective jurors were brought into Court and qualified by the Court after which time the Court was requested to, and did, grant the parties additional time to confer. Subsequently, the prospective jurors were dismissed (See Record in evidence). At that time the petitioner and his attorneys executed "Court's Exhibit A" in each case. The petitioner then entered Pleas of Guilty in each case and was sentenced to five consecutive life sentences in the penitentiary.

Subsequent to the Supreme Court's decision in Furman v. Georgia, supra, the petitioner, in 1973, filed a Pro Se Petition for Writ of Error Coram Nobis. This Court, on May 4, 1973, granted the State's Motion to Dismiss and dismissed the petitions (See Trial sheets in evidence).

Then, in 1975, the petitioner was charged with and convicted of Murder in the First Degree under Title 14, Section 319, Code of Alabama (1940). Punishment was fixed by the jury at death. On September 9, 1977, the Supreme Court of Alabama affirmed and the execution date was set for March 10, 1978. Harris v. State, 352 So.2d 460.

On February 17, 1978, the petitioner through his volunteer attorneys filed a Motion for a Stay of Execution and a Petition for Writ of Error Coram Nobis in each of the aforementioned five cases. This Court denied the Motion for a Stay of Execution. On March 7, 1978, the Honorable Virgil Pittman, Judge of the United States District Court

for the Southern District of Alabama, granted a Stay of Execution for a period of sixty days and ordered the petitioner to file all proper petitions by March 21, 1978. On March 21, 1978, the petitioner through his volunteer attorneys filed an Amendment to his Petitions for Writ of Error Coram Nobis.

This Court, on March 22, 1973, entered an order setting the hearing on the Petitions for Writ of Error Coram Nobis for March 31, 1978, at 10:00 a. m. and ordered the Clerk to notify all of the parties. On said March 31, 1978, this Court heard and ruled on numerous motions and the petitioner and his volunteer attorneys were granted a continuance to April 6, 1978, for hearing on the Petitions for Writ of Error Coram Nobis.

On April 4, 1978, the petitioner through his volunteer attorneys filed a Motion for a Temporary Restraining Order against Joseph Jasper, et. al., in the United States District Court for the Northern District of Alabama and presented same to the Honorable Sam Pointer, Judge. On April 5, 1978, Judge Pointer denied the motion and the United States Court of Appeals, Fifth Circuit, denied an emergency appeal on April 6, 1978. At 9:00 a.m. on said date hearing was begun on the Petitions for Writ of Error Coram Nobis and the Amendment filed thereto.

I

The petitioner filed Motions for Appointment of Counsel and Motions for Funds for Investigative and Hearing Purposes and for Payment of Counsel in each of the five cases. The petitioner was represented in all proceedings by volunteer attorneys who appeared and adequately and competently represented him. These attorneys have repre-

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sented the petitioner in the Circuit Courts, Appellate Courts of Alabama and Federal Courts as is shown in Paragraph 4 of the Motions for Funds, etc. This Court finds that in all proceedings to date, the attorneys, Honorable William A. Allison, Honorable Eleanore Garber, Honorable W. Clinton Brown and Honorable H. Diana Hicks, have been well prepared and have adequately and competently represented the petitioner. Therefore, there was no injury or denial of due process nor denial of right to counsel to the petitioner when this Court denied the Motions for Appointment of Counsel for a Coram Nobis hearing. Ford v. U. S., (5th Cir.) 363 F. 2d 437, (1966); Juelich v. U. S. 342 F. 2d 29. The denial of the Motions for Funds for Investigative and Hearing Purposes and for Payment of Counsel was not a denial of due process. While some provisions are made for this in the Federal system, it is not the present situation in this state. Tillis v. State, 292 Ala. 521, 296 So. 2d 892; Wheeler v. State, 47 Ala. App. 457, 256 So. 2d 197; and more recently in Harris v. State, 352 So. 2d 460, the Alabama Court of Criminal Appeals stated:

> "Appellant was not denied due process where the State did not provide funds for the employment of a special investigator to aid him in procuring witnesses in his defense." Citing Tillis v. State, supra.

That the petitioner had the assistance of able and competent counsel through all of these proceedings; that these volunteer attorneys protected all of the

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petitioner's rights through all of the proceedings; that the petitioner did in fact have experts to testify in his behalf during the proceedings; and that this Court, at the request of the petitioner, issued numerous subpoenas and Subpoenas Duces Tecum further leads this Court to find, and it is so held, that none of the petitioner's rights have been violated by the denial of the Motions for Funds.

II

As noted above, the petitioner entered Pleas of Guilty on April 6, 1971, to one case of Rape and four cases of Robbery. These pleas were entered prior to the decision in Furman v. Georgia, supra.

The petitioner by Motion and in his Petitions for Writ of Error Coram Nobis and the Amendment thereto attempted to present matters affecting the criminal processes prior to the Pleas of Guilty. As shown by Brady v. U. S., 397 U. S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463, a defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. In the instant cases, the petitioner entered guilty pleas and was sentenced to five consecutive life sentences as opposed to the maximum punishment of death in each case.

A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a person admits in Open Court that he is in fact guilty of the crime or crimes with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." He may only attack the voluntary

and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann v. Richardson, 397 U.S. 75, 25 L. Ed. 2d 763, 90 S. Ct. 1441,:

> "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of defendant's confession."

As shown by the Bench notes in each of the five cases, the defendant was asked by the Court if he had anything to say why the Court should not impose the sentence and he replied in each instance, "No Sir." The petitioner never complained of the character of the pleas of guilty prior to Furman v. Georgia, supra. It was only after the Furman decision that the petitioner, in 1973, filed a Pro Se Petition for Writ of Error Coram Nobis and at that time he did not complain of the advice of his court appointed attorneys. The only allegation made in his Pro Se Petition was, "Petitioner contends that he was represented in Court, by a court appointed attorney, who seemingly didn't have petitioner's interest at heart."

Quoting again from McMann, supra., "What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given

another choice between admitting their guilt and putting the State to its proof."

Once the defendant chooses to by-pass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained. Lefkowitz v. Newsome, 420 U. S. 283, 43 L. Ed. 2d 196, 95 S. Ct. 886; McMann v. Richardson, supra. In all criminal prosecutions there must be a finality of litigation and how more final than a valid plea of guilty where a defendant in open court with competent counsel solemnly admits to having committed the crime for which he stands charged?

The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action opened to the defendant. North Carolina v. Henry Alford, 400 U. S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160, (1970). If the guilty pleas were voluntarily and intelligently made, the defendant should not be allowed to later attack the plea, even though he maintained his innocence, should he select that alternative, knowing the sentence to be less than the maximum. North Carolina v. Alford, supra.

In Boykin v. Alabama, 395 U. S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969), the Supreme Court of the United States held that the record must disclose that the defendant voluntarily and intelligently and understandingly entered the plea of guilty. As in the cases before this Court, the Record, Bench notes and "Court's Exhibit A," also known as

the "Ireland Form," were sufficient record to show that the petitioner, at the time of the pleas, knowingly, intelligently and understandingly entered such pleas. Twyman v. State, 293 Ala. 75, 300 So. 2d 124; Ireland v. State, 47 Ala. App. 65, 250 So. 2d 602; White v. State, 54 Ala. App. 27, 304 So. 2d 268.

As to the Preliminary Hearing, the petitioner cannot raise independent claims to denial of constitutional rights which arose prior to the guilty pleas. Lefkowitz v. Newsome, supra; Tollett v. Henderson, 411 U. S. 258, 36 L. Ed. 2d 235, 93 S. Ct. 1602.

III

Each accused is entitled not only to assistance of counsel, but to effective assistance of counsel. Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, (1932). As stated in Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), the State must appoint counsel for an accused felon if he cannot afford to hire his own attorney.

The same standards of representation apply whether counsel is retained or appointed. The standard of effective counsel does not guarantee an accused an attorney with whose advise he can agree nor can it be equated with a not guilty verdict. When the question arises whether an accused should plead guilty, waive a trial by jury or take the witness stand, defense counsel must be governed by and abide by the wishes of his client. Taylor v. State 291 Ala. Rep. 356; 281 So. 2d. 901.

Effective assistance does not mean that counsel

is not free from error. What may later seem to be error may have been a trial tactic at the time. As to what pre-trial motions should be filed and other strategic and tactical decisions should be within the province of the lawyer after consultation with the client. Quoting Chief Justice Burger, who wrote while a Circuit Judge for the United States Court of Appeals, District of Columbia Circuit. "We reject the notion that it is defense counsel's duty to 'make every motion in the book' in the hope that one may succeed." There is a heavy burden on petitioner to establish his claim of ineffective assistance of counsel. Harried v. U. S., 128 U. S. App. D. C. 330, 389 F. 2d 261.

In Williams v. Beto, 354 F. 2d 698, 704 (5th Cir. 1965), the Fifth Circuit Court of Appeals said:

> "It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory or without adequate opportunity for conference and preparation."

See also United States v. Long, 419 F. 2d 91, (5th Cir.). The petitioner in these five cases failed to advise the Trial Court as to any disagreement between said petitioner and his court appointed attorneys.

This Court holds that the petitioner has failed to carry the heavy burden to show incompetent or ineffective counsel. This Court further finds that the court appointed attorneys, Honorable Louis Scholl and Honorable Milton Garrett, were and are competent and effective defense attorneys to represent indigents in any jurisdiction. Both of these attorneys have handled numerous criminal matters competently and effectively in this Court and the five cases in question here are no exception.

IV

Finally, we should address the issue of the purpose of the Writ of Error Coram Nobis in the criminal justice system. This Court has found no better words regarding this issue than those of the Supreme Court of Alabama and reiterated by the Alabama Court of Criminal Appeals and the United States District Court for the Southern District of Alabama:

> "The office of the 'writ of error coram nobis,' under Alabama Law, is to bring to the attention of the Court for correction of an error of fact, one not appearing on the face of the record, unknown to the Court or party affected, and which, if known in time, would have prevented the judgment challenged and serves as a motion for a new trial on the ground of newly discovered evidence. The writ

> is not intended to relieve a party from his own negligence, and cannot serve as a substitute for an appeal, nor to enable a defendant to question the merits of the case for which he stands convicted." Tillis v. State, 349 So. 2d 95, (1977); Groce v. State, 48 Ala. App. 709, 267 So. 2d 499; Smith v. Hickson, 149 F. Supp. 283; Smith v. State, 245 Ala. 161, 16 So. 2d 315.

V

On due and careful consideration of the evidence before this Court on each of the grounds of the Petitions and the Amendment thereto, separately and severally, it is the opinion of this Court that no ground of the Petitions and the Amended Petitions is well founded. It is further the opinion of this Court that the petitioner was not denied any right afforded him under the Constitution of the United States or the Constitution of the State of Alabama nor under any law thereof; that he voluntarily and intelligently and understandingly entered pleas of guilty in each case with full knowledge of all of his rights, including those he was waiving by entering said pleas; that the pleas were voluntarily, knowingly and intelligently made along with and on the advice of capable, experienced, competent and effective attorneys. It is, therefore, the opinion of this Court that the Petitions and the Amended Petitions and each ground thereof should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Petitions for Writ of Error Coram Nobis and the Amendments thereto be and are hereby denied.

IT IS FURTHER ORDERED that a copy of this Decree be forwarded by the Circuit Clerk to the petitioner at his address shown in the file, and to his attorneys of record in this cause, to the Attorney General of the State of Alabama, to the Department of Corrections of the State of Alabama and to the District Attorney for the Tenth Judicial Circuit of Alabama.

DONE and ORDERED this 19th day of April 1978.

Joseph J. Jasper
Circuit Judge.

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No. 81-313

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH OLIVER, WARDEN,
Holman Prison, Alabama,

Petitioner,

-against-

JOHNNY HARRIS,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, Johnny Harris, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent has proceeded in forma pauperis throughout the lower federal and state courts in this action. The respondent's affidavit of indigency is annexed.

Dated: September 16, 1981

Respectfully submitted,

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ATTORNEY OF RECORD

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 1 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-313

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980

JOSEPH OLIVER, WARDEN
HOLMAN PRISON, ALABAMA

PETITIONER

V.

JOHNNY HARRIS,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF CASES.....ii

REPLY ARGUMENT

I. ON THE NEED FOR A NEW HEARING.....1

A. IMPLIED STATE COURT FINDINGS.....1

B. THE DISTRICT COURT WAS ABLE TO DETERMINE CREDIBILITY FROM THE RECORD.....5

II. THE DISTRICT COURT'S AUTHORITY TO REQUEST ADDITIONAL FINDINGS BY THE STATE COURTS.....6

III. ON HARRIS "MISLEADING" THE COURT AT THE TIME OF HIS PLEAS.....8

CONCLUSION.....12

CERTIFICATE OF SERVICE.....14

TABLE OF CASES

PAGE

Blackledge v. Allison,
431 U.S. 63, 52 L. Ed. 2d
136, 97 S. Ct. 1621 (1977).....8,11

Boykin v. Alabama,
395 U.S. 238, 23 L. Ed. 2d
274, 89 S. Ct. 1709 (1969).....8

Cornelius v. State,
54 Ala. App. 377, 308 So.
2d 736 (1975).....10

LaVallee v. Delle Rose,
410 U.S. 690, 35 L. Ed. 2d
637, 93 S. Ct. 1208 (1973).....4

Sumner v. Mata,
___ U.S. ___, 66 L. Ed. 2d
722, 101 S. Ct. ___ (1981).....4

Townsend v. Sain,
372 U.S. 293, 9 L. Ed. 2d
770, 83 S. Ct. 745 (1963).....4

Walcott v. State,
288 Ala. 546, 263 So. 2d
178 (1972).....10

REPLY ARGUMENT

I.

ON THE NEED FOR A NEW HEARING

A.

IMPLIED STATE COURT FINDINGS

The Respondent argues that the State Trial Judge made no findings of credibility in his order. It is admitted that the State Judge did not specifically articulate a finding that Harris was lying and his lawyers were not. However, the Judge's order clearly implies such a finding within the context of the case. That context was this: Harris claimed that his guilty pleas were the result of his lawyers acting with callous disregard for his rights and interests; according to his lawyers Harris' guilty pleas were entirely his own idea and were in fact entered contrary to their advice. In this context, the State trial judge

issued an order which would have made no sense at all if his Honor believed Harris rather than his attorneys. (Respondent's Exhibit "A," pp. 945-956) A few quotations from this order demonstrate this:

> "...Effective assistance does not mean that counsel is not free from error. What may later seem to be error may have been a trial tactic at the time. As to what pretrial motions should be filed and other strategic and tactical decisions should be within the province of the lawyer after consultation with the client. Quoting Chief Justice Burger, who wrote while a Circuit Judge for the United States Court of Appeals, District of Columbia Circuit. 'We reject the notion that it is defense counsel's duty to "make every motion in the book" in the hope that one may succeed.' There is a heavy burden on petitioner to establish his claim of ineffective assistance of counsel. Harried v. U.S., 128 U. S. App. D. C. 330, 389 F. 2d 261...." (Respondent's Exhibit "A," pp. 952-953)

> "...This Court further finds that the court appointed attorneys, Honorable Louis Scholl and Honorable Milton Garrett,

> were and are competent and effective defense attorneys to represent indigents in any jurisdiction. Both of these attorneys have handled numerous criminal matters competently and effectively in this Court and the five cases in question here are no exception...." (Respondent's Exhibit "A," p. 954)
>
> "...that the pleas were voluntarily, knowingly and intelligently made along with and on the advice of capable, experienced, competent and effective attorneys. It is, therefore, the opinion of this Court that the Petitions and the Amended Petitions and each ground thereof should be denied...." (Respondent's Exhibit "A," p. 955)

None of this language would make any sense at all if the Judge believed Harris' claim. Finally consider this language:

> "...When the question arises whether an accused should plead guilty, waive a trial by jury or take the witness stand, defense counsel must be governed by and abide by the wishes of his client. Taylor v. State 291 Ala. Rep. 756; 287 So. 2d. 901...." (Respondent's Exhibit "A," p. 952)

This statement of the law of Alabama regarding defense counsel's duty to abide by the defendant's wishes in the matter of a guilty plea, in the context of an order denying relief, clearly shows that the State Trial Judge believed the lawyers when they said that the pleas were Harris' idea and were contrary to their advice. The State trial Judge clearly made implied findings of credibility against Harris and in favor of his former attorneys. See Townsend v. Sain, 372 U.S. 293, 314, 9 L. Ed. 2d 770, 789, 83 S. Ct. 745 (1963); LaVallee v. Delle Rose 410 U.S. 690, 692, 35 L. Ed. 2d 637, 640, 93 S. Ct. 1203 (1973). The State appellate court recognized this fact. See Appendix "D" to the Petition, pages 80, 86 and 90. This finding by the State appellate court was likewise due a presumption of correctness. Sumner v. Mata,

___ U.S. ___, 66 L. Ed. 2d 722, 101 S. Ct. ___ (1981)

Therefore, the District Court was justified in relying on the State Court's implied findings on credibility, if it in fact did so.

B.

THE DISTRICT COURT WAS ABLE TO DETERMINE CREDIBILITY FROM THE RECORD

Except for rejecting the State Court finding on the ultimate Federal Question, the District Court did not refer to the State Court findings. Apparently the District Court made independent findings of credibility based on the State Court Record. As argued in the petition, the District Court was able and authorized to do this.

The Respondent does not question this point.

II.

THE DISTRICT COURT'S AUTHORITY TO REQUEST ADDITIONAL FINDINGS BY THE STATE COURTS

The Court of Appeals ordered an entirely new hearing in this case, not because the State Court hearing was unfair or less than full but because the State Trial Judge did not make specific findings on credibility and decided the ultimate Federal Question under an inappropriate standard. The Petition argues that the District Court ought to be allowed to request an articulation of the State Court's findings on credibility and/or a reconsideration of the ultimate Federal Question under the appropriate standard. In response to this the Respondent argues that the District Court has no jurisdiction to remand the case back to State court or to order additional findings.

The Petitioner has never suggested that this case ought to be remanded back to State court. The whole purpose of the procedure suggested by the Petitioner is to avoid a duplication of hearings. Remanding the case back to State court for a second state court hearing would make less sense than holding a second hearing in Federal Court. However, remandment is utterly unnecessary.

On the other hand, the Petitioner has never suggested that the Federal Courts order the State courts to do anything; the word is "request." It is inherent in the power of every court, institution and person to make requests. Obviously, if the State Courts refuse the request the case would be back where it started with no one harmed. However, if the State Courts comply with the request, it would relieve the Federal Court of a

great burden, while adding little to that of the State Court.

III.

ON HARRIS "MISLEADING" THE COURT AT THE TIME OF HIS PLEAS

The Appellant argues that this Honorable Court has decided on several occasions that a convict may collaterally attack his pleas of guilty, but this misses the point. The point here is that, assuming the truth of Harris' present claim, he affirmatively misled the State Trial Court at the time of his plea. Two of the cases cited by the Respondent were, as pointed out in the petition, pre-Boykin.[1] The Respondent also cites Blackledge v. Allison, (431 U.S. 63, 52 L. Ed. 2d 136, 97 S. Ct. 1621 [1977])

[1] Boykin v. Alabama, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S. Ct. 1709 (1969). See Petition, footnote 11, p. 32.

Blackledge is, as will be discussed below, easily distinguishable from the instant case. However, this Court's language in Blackledge clearly demonstrates this Honorable Court's strong policy against setting aside judgments based on guilty pleas.

In Blackledge the convict claimed a breeched plea bargain. At the time of his plea the convict, Allison, on a printed form admitted to knowledge of the maximum and minimum sentences and stated that no one had promised him anything. He claimed that he had made these statements because he was advised that if he did not, the plea would not be accepted and the plea bargain would fall through. The printed form did not mention plea bargaining. On the basis of the printed guilty plea form only the District Court denied relief. This Court held that,

since at the time of the plea the status of plea bargaining was unclear (431 U.S. 63, 77 ff, 52 L. Ed. 2d 136, 148 ff), the claim could not be disposed of solely on the basis of the printed form.[2]

In the instant case, Harris is claiming that his plea was involuntary. Where the printed form in Blackledge did not mention plea bargaining, the printed forms read and executed by Harris were directed entirely to the voluntariness of the proposed guilty pleas. Where the Court in Blackledge had before it only

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[2]It is quite possible that behind the Blackledge opinion lies a desire to avoid allowing guilty pleas to become a matter of printed forms and rubber stamp procedures. If this is so, it is worth noting that the Alabama Courts have long forbidden such an approach to guilty pleas. While the use of forms is allowed, there must still be an oral colloquy between the defendant and the court. Walcott v. State, 288 Ala. 546, 263 So. 2d 178 (1972); Cornelius v. State 54 Ala. App. 377, 308 So. 2d 736 (1975). In the instant case, Harris received such a colloquy, but the Court Reporter's notes were lost prior to his raising his claim.

the printed form, there was a hearing in the instant case at which the unconflicting evidence shows that Harris was examined by the Court at the time of his pleas as to the voluntariness of the pleas. See the Statement of Facts in the Petition, page 16, "II The Unconflicting Evidence." Where the convict in Blackledge claimed, and this Court found it possible, that he thought it improper to admit the plea bargain in open court, Harris in the instant case claimed to have made a half hearted effort to advise the Judge of his dispute with his lawyers.[3] Thus, the instant case presents the case of a convict seeking to set aside a guilty plea on the basis of

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[3]Although the State Court found: "...The petitioner [Harris] in these five cases failed to advise the Trial Court of any disagreement between said petitioner and his court appointed attorneys...." (Respondent's Exhibit "A," p. 953)

an alleged fact which he (1) had to have been aware of at the time of the plea, (2) appreciated the significance of at the time of the plea but which he withheld from the Court and misled the Court about when he was examined about the voluntariness of the plea. The Petitioner again respectfully submits that these facts constitute a waiver.

CONCLUSION

In conclusion the Petitioner again respectfully submits that this case presents important questions of Federal Constitutional Law which have not been but ought to be decided by this Honorable Court and conflicts with prior opinions. For these reasons the Petitioner again prays that this Honorable Court will issue the writ of certiorari and review

the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Joseph Oliver, Warden, Petitioner, do hereby certify that on this ____ day of _____, 1981, I did serve the requisite number of copies of the foregoing on the Attorney Of Record for Johnny Harris, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

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